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08:37:26 1 (Commenced at 8:39 a.m.)

08:39:02 2 THE COURT: How do you want to proceed? I'd

08:39:04 3 like to be completed, by the way, by about 10:00, if not

08:39:08 4 sooner. I've got a trial this afternoon, some things I

08:39:13 5 have to get done.

08:39:14 6 MR. SOFER: If it's acceptable to the Court,

08:39:16 7 the government has a few preliminary remarks, then I

08:39:19 8 assume defense counsel will want to make argument on

08:39:22 9 their motion, then we'll respond. If it's acceptable

08:39:30 10 with the Court, that would be our preference.

08:39:34 11 MR. HARTMAN: Judge, I would imagine some

08:39:36 12 responses probably in response to the government's would

08:39:39 13 be appropriate. We were prepared to let the Amawi team

08:39:43 14 go first since they were first named in the indictment.

08:39:47 15 THE COURT: That's fine.

08:41:50 16 Mr. Sofer, go ahead.

08:41:52 17 (Defendant El-Hindi enters the courtroom.)

08:41:53 18 MR. SOFER: Basically, Judge, I think it's

08:41:55 19 the government's position -- obviously we've briefed

08:41:58 20 this extensively, and Your Honor has no doubt read and

08:42:02 21 seen all the papers in the case -- that essentially

08:42:10 22 these motions, there's nothing new. That would be the

08:42:15 23 government's main position throughout this. They're

08:42:19 24 essentially an attempt to relitigate the issue of guilt

08:42:22 25 in the case or to commence some sort of argument related

08:42:25 1 to sentencing. And I would just ask the Court to pay
08:42:32 2 heed to the following concepts and issues as we go
08:42:36 3 through this. And we're prepared, if Your Honor
08:42:39 4 wants -- we will be prepared; if counsel wants, we will
08:42:43 5 be prepared to rebut the specific factual statements
08:42:46 6 inside a lot of these motions. But our basic position
08:42:50 7 is the following, Your Honor: On the Rule 29 motion,
08:42:55 8 Your Honor's more familiar than I with the legal
08:42:59 9 standard. I'm not here to try to brief Your Honor on
08:43:01 10 the law. But I would say if you look at these motions,
08:43:07 11 every issue raised, every issue raised has been decided
08:43:11 12 previously at a time when the Court was -- had just
08:43:18 13 heard all the evidence, had just seen all the witnesses,
08:43:22 14 had just seen all the exhibits, had just heard much of
08:43:25 15 the argument in the case. Of course, the government
08:43:29 16 concedes that these motions are properly made, renewed
08:43:32 17 under the rule, but we believe that the case law shows
08:43:38 18 that post-verdict the defense has an even higher burden
08:43:46 19 in some senses.

08:43:49 20 THE COURT: Well, obviously the inferences
08:43:52 21 are drawn in your favor at this stage.

08:43:55 22 MR. SOFER: Correct, Your Honor. If you
08:43:57 23 read counsel's motion, and I assume they'll make
08:44:00 24 argument based on that as well, they do the exact
08:44:05 25 opposite many times, and that is the interplay. They

08:44:08 1 apply the wrong standard. They state the standard in
08:44:11 2 the beginning of their motions, but they go on
08:44:13 3 throughout their motion to essentially apply a standard
08:44:16 4 in which the inferences that can be drawn are drawn in
08:44:19 5 the defense's favor, not the government's favor, which
08:44:23 6 is not the law.

08:44:24 7 I mean, there are a number of examples of
08:44:28 8 this, and we tried to point that out, I think, in our
08:44:31 9 motion responses that there were cases where, for
08:44:36 10 instance, they said there was no evidence; all we have
08:44:38 11 is the testimony of Darren Griffin. Well, that is the
08:44:42 12 evidence in some cases, was the testimony of Darren
08:44:44 13 Griffin. It may have been uncorroborated. They may
08:44:48 14 think that Darren Griffin did not have credibility on
08:44:50 15 that issue. The jury obviously found otherwise.

08:44:54 16 As Your Honor well knows, on a Rule 29
08:44:56 17 motion the Court is not to examine the credibility of a
08:44:58 18 witness. Again, I think that all -- if you go through
08:45:05 19 it item by item by item by item, there's nothing Your
08:45:10 20 Honor hasn't seen; there's nothing you haven't
08:45:12 21 considered before the first time that you heard these
08:45:15 22 motions, and we'd ask you to obviously rule the same way
08:45:20 23 you did the first time the Rule 29 motion was made.

08:45:24 24 THE COURT: Is there anything specifically
08:45:25 25 with regard to Mr. Amawi that you would comment on?

08:45:30 1 MR. SOFER: You're asking the government,
08:45:31 2 Your Honor?

08:45:31 3 THE COURT: Yeah.

08:45:32 4 MR. SOFER: Both Mr. Herdman and Mr. Getz
08:45:35 5 are here to respond specifically to the facts. And I'd
08:45:39 6 like to hear what counsel wants to argue first, if
08:45:43 7 that's okay.

08:45:43 8 THE COURT: Okay.

08:45:44 9 MR. SOFER: On the Rule 33 motion, Your
08:45:47 10 Honor, again, there's the two bases upon which to bring
08:45:50 11 this motion; the first is new evidence. There's
08:45:52 12 absolutely no new evidence proposed or put forward by
08:45:58 13 these motions; none.

08:46:00 14 Instead, I think they rely much more on the
08:46:03 15 interest of justice prong of Rule 33. And here
08:46:08 16 basically, again, it's an attempt, in the government's
08:46:14 17 opinion, to relitigate the issues in the case. They
08:46:18 18 essentially are questioning the conduct of the trial,
08:46:21 19 the rulings of the Court, and the jury's behavior in the
08:46:25 20 case. Again, every decision, every significant issue
08:46:33 21 that they brought up in this case was fully and fairly
08:46:37 22 litigated.

08:46:39 23 THE COURT: Understand. I would agree with
08:46:41 24 that.

08:46:41 25 MR. SOFER: And there was extensive

08:46:44 1 briefing, extensive argument, extensive thought by the
08:46:48 2 Court. The Court sometimes took a significant period
08:46:50 3 of time even after argument had been made to consider
08:46:54 4 these things. We compromised many times. There were
08:46:58 5 well thought out decisions written about the case.

08:47:01 6 None of this, none of this was an off-the-hip sort of
08:47:06 7 quick decision by Your Honor. And the government can
08:47:15 8 see it was all well-reasoned and appropriately decided.

08:47:18 9 On the jury's behavior, I think we all
08:47:20 10 conceded -- and I find it sort of odd at this juncture
08:47:24 11 there's some question even as to this -- that this was
08:47:26 12 really an amazing jury. I think both the prosecution,
08:47:30 13 the government, the defense, and Your Honor, and anyone
08:47:35 14 who watched this trial got to see that. It was a
08:47:39 15 fairly amazing demonstration of a group of people who
08:47:43 16 were listening carefully, paid a lot of attention, and
08:47:46 17 did everything they could to try the case fairly. And
08:47:49 18 the notion that they did something in this case, they
08:47:53 19 were rogue and they were unable to sort out issues and
08:47:57 20 unable to discern that which was a political issue or an
08:48:04 21 emotional issue from the facts of the case, or did
08:48:07 22 anything remotely inappropriate, given all the
08:48:09 23 instructions that they got -- and they got many, many of
08:48:12 24 them -- I believe is just an untenable argument.

08:48:15 25 In any event, Your Honor, my preliminary

08:48:18 1 remarks are intended to say, in many senses these
08:48:23 2 motions are nothing new. And I understand why the
08:48:28 3 defense would want to relitigate all these issues, but
08:48:31 4 we've done this already; we've been here; we've done
08:48:35 5 this. They want to appeal. We're obviously ready for
08:48:38 6 that. We anticipate a vigorous appellate brief from all
08:48:42 7 the defendants in this case. And that's what they
08:48:45 8 should do. But this is not the right vehicle to do
08:48:47 9 that.

08:48:48 10 THE COURT: Okay.

08:48:50 11 MR. BRYAN: Your Honor, if I could take the
08:48:52 12 podium.

08:48:52 13 THE COURT: Sure.

08:48:56 14 MR. BRYAN: Your Honor, it's certainly not
08:48:59 15 my intention here today to retry the case.

08:49:03 16 THE COURT: Let me ask some questions that I
08:49:06 17 think you should address.

08:49:12 18 With regard to whatever difficulties Mr.
08:49:15 19 Amawi has encountered since conviction, if I calculate
08:49:21 20 correctly, there are four and a half months -- five and
08:49:30 21 a half months that elapsed since return of the verdict
08:49:34 22 and the filing of a new trial motion. I believe I
08:49:38 23 granted every request for an extension in that regard.
08:49:43 24 And I don't recall, I may be mistaken, but I don't
08:49:47 25 recall except quite vaguely one instance perhaps where

08:49:52 1 some concern was raised about Mr. Amawi's situation and
08:49:59 2 problems that he may have been encountering up at Milan
08:50:04 3 in terms of access to materials. That's question one.
08:50:09 4 And question 2, quite candidly, I don't see
08:50:12 5 an answer to the question that I raised in the midst of
08:50:15 6 the proceedings. Candidly, I think I should have raised
08:50:19 7 it a lot sooner. This whole business about translators,
08:50:23 8 if I understand correctly, practically every
08:50:27 9 conversation in which Arabic was used involved the use
08:50:33 10 of Arabic by one of the defendants. There may have
08:50:36 11 been a couple others: the one over the computer with the
08:50:41 12 person in Syria or wherever or believed to be in Syria.
08:50:45 13 But why do you need translators to tell you what your
08:50:50 14 own clients meant when they used a particular Arabic
08:50:55 15 phrase? It's my understanding that all three of them
08:50:57 16 are fluent in Arabic. And Mr. Amawi at one point was
08:51:03 17 contacted by somebody about possibly being a translator,
08:51:08 18 and he declined to do so; he wanted nothing to do with
08:51:14 19 helping the American forces in Iraq. So candidly, I
08:51:20 20 see the whole thing about translating and the time
08:51:26 21 required and the difficulty and the expense and all of
08:51:29 22 that as simply being way off the mark. I really do.
08:51:37 23 I'm fairly fluent in German, far from perfect. But if
08:51:42 24 I were to say something in German, rather than turning
08:51:45 25 to somebody, a native speaker, to tell you what I meant

08:51:49 1 to say in German, ask me.

08:51:55 2 MR. BRYAN: Your Honor, I understand what
08:51:57 3 Your Honor is saying; that is that the defendants, since
08:51:59 4 they speak Arabic, they could translate for the defense
08:52:02 5 attorneys that which was spoken in Arabic.

08:52:06 6 It should be noted at the outset, however,
08:52:08 7 that the government provided transcripts. Much of when
08:52:11 8 it got to the Arabic portion of the transcript, it would
08:52:15 9 say "Male speaking in Arabic," and it didn't translate.

08:52:18 10 On at least one or two occasions, one that
08:52:21 11 was actually pointed out to Your Honor at the end of
08:52:24 12 trial when we were trying to present our case, there was
08:52:26 13 information in there that we would have considered
08:52:28 14 exculpatory that the Arabic translator said: "Man
08:52:33 15 speaking in Arabic." That occurred on January 27, 2005
08:52:36 16 in the presence of Darren Griffin with Mohammad Amawi
08:52:39 17 online with another individual. And the translator
08:52:42 18 from the government said "Man speaking in Arabic." And
08:52:45 19 when we get the translation of what was said, and
08:52:49 20 admittedly Mohammad Amawi was one of the persons who was
08:52:51 21 able to give that to us, but we didn't have
08:52:53 22 independent -- we didn't have independent translator
08:52:58 23 verification of that.

08:53:00 24 THE COURT: Of the statements attributed to
08:53:02 25 a third person?

08:53:04 1 MR. BRYAN: Statements attributed to the
08:53:06 2 third person. Those statements were a gentleman
08:53:08 3 speaking on the computer to Mr. Amawi saying: I don't
08:53:11 4 care if the person sitting next to you is recording
08:53:13 5 everything that I'm saying. I'm speaking only the
08:53:16 6 truth of Allah, so let him hear the truth of Allah.

08:53:23 7 THE COURT: If I recall correctly -- and if
08:53:25 8 I don't, tell me -- but the third-party Arabic
08:53:32 9 statements, spoken statements, were but a small fraction
08:53:42 10 of the recorded Arabic conversations. The vast
08:53:45 11 majority was one or more of the -- I can't recall; I
08:53:51 12 think Mr. Mazloum may have been recorded a little teeny
08:53:56 13 bit about Insallah or whatever. But in terms of the
08:54:00 14 actual conversation, I think it was Mr. Amawi with a
08:54:06 15 fair amount from Mr. El-Hindi, as well as from Mr.
08:54:12 16 Mazloum.

08:54:12 17 MR. BRYAN: Your Honor, as far as -- I'm not
08:54:15 18 sure I understand.

08:54:16 19 THE COURT: I'm being very candid with you.
08:54:19 20 That's something I interjected kind of in the midst of
08:54:22 21 the thing. I have no doubt when you get down to
08:54:24 22 Cincinnati they're going to want an answer to that
08:54:26 23 question, and I don't see it in your brief, and I think
08:54:29 24 it's crucial because you spent a lot of time about how
08:54:32 25 you were impaired by what you consider to be an

08:54:36 1 ultimately brief period of time for preparation.

08:54:39 2 Candidly, I think that is a fair and plausible argument

08:54:42 3 to address to the Circuit. I considered your

08:54:47 4 circumstances. I tried to express the reasons for

08:54:52 5 insisting upon the trial date that I did. Your record

08:54:55 6 is ample in terms of your objection. I don't think the

08:55:00 7 government could stand up with a straight face down in

08:55:05 8 Cincinnati in front of a panel and say: They didn't

08:55:08 9 preserve that issue. Clearly it is, and it's a crucial

08:55:11 10 issue. And I may have made a mistake. I don't know.

08:55:14 11 But I don't think I did. And I thought about it very

08:55:19 12 deliberately. And it may have been error of me to have

08:55:25 13 taken into consideration the fact that the shuffle in

08:55:30 14 counsel was due to two things: one, Mr. Amawi's refusal

08:55:38 15 to abide by what the facts in the law were that there

08:55:44 16 was no conflict of interest because Mr. Terez was paid

08:55:48 17 by the government, none, zero. It may have been error

08:55:55 18 for me to have been as accommodating as I was. But I

08:56:00 19 tried to insure he would have counsel that he would have

08:56:03 20 absolute confidence in. And again, those are issues

08:56:06 21 fairly and well preserved in the record. And I can see

08:56:13 22 that reasonable men can differ as to the decision, and

08:56:16 23 that two more judges down there might say to me I've

08:56:23 24 abused my discretion; I even violated a constitutional

08:56:27 25 right. No one would be less happy than I about that.

08:56:34 1 I don't think I did. But on the other hand --

08:56:38 2 MR. BRYAN: Your Honor, of course we've

08:56:40 3 never alleged or asserted bad faith in this matter from

08:56:43 4 Your Honor.

08:56:44 5 THE COURT: I understand that.

08:56:44 6 MR. BRYAN: But what we've tried to do

08:56:46 7 through the pleadings is tried to reveal to Your Honor

08:56:49 8 the case from our perspective, and notwithstanding the

08:56:52 9 fact that Mr. Terez was involved in the case for eight

08:56:54 10 months preceding at the very beginning of this case.

08:56:58 11 THE COURT: I'm willing to accept that there

08:57:00 12 is very little that was in his locker, so to speak,

08:57:06 13 that's going to be much use to you. I understand that.

08:57:09 14 MR. BRYAN: I think everyone would agree the

08:57:11 15 initial stages of this case the transcripts were still

08:57:13 16 being prepared, things were still being discovered,

08:57:19 17 things were being looked at for the first time. We all

08:57:22 18 realize this case involved a tremendous amount of

08:57:26 19 discovery that involved information that took place over

08:57:29 20 two-plus years. The problem that we saw in this case

08:57:31 21 is Your Honor was viewing Mr. Amawi's representation as

08:57:34 22 seamless because he always had counsel. But the problem

08:57:37 23 that we had when we came into the case in mid January,

08:57:40 24 2008, is that which took place in the 15 months prior to

08:57:44 25 that. And I'm not here to cast dispersions on counsel

08:57:47 1 in the interim, but there was a 15-month period of time
08:57:53 2 where the record -- if it's not clear now will become
08:57:56 3 clear at a later proceeding, very little was done. And
08:57:58 4 Mr. Amawi raised those concerns to Your Honor on
08:58:01 5 numerous occasions ex parte which -- not ex parte, but
08:58:05 6 in camera, which eventually led to our office becoming
08:58:08 7 involved in the case again.

08:58:09 8 And so here we are coming back involved in
08:58:12 9 the case. One of the first things that I chastised
08:58:16 10 everybody about was the lack of a complete
08:58:18 11 defense-created transcript. And Mr. Doughten came up to
08:58:23 12 me after I lost my cool back in that room and said,
08:58:26 13 Where's the transcript? Where's the transcript? The
08:58:28 14 government, they don't have to give you the transcript;
08:58:30 15 they just have to give you the tape. You've had these
08:58:34 16 tapes for years. Where's the defense-created
08:58:37 17 transcript? Mr. Doughten came up --

08:58:40 18 THE COURT: I don't want you to -- to some
08:58:44 19 extent, if I recall correctly, it was sort of a defunct
08:58:48 20 joint defense approach. I don't want any doors opened.

08:58:52 21 MR. BRYAN: Just to suggest his client was
08:58:55 22 involved and everyone was involved in a lot less
08:58:57 23 transcript than the other two defendants in this matter.
08:59:00 24 And Mr. Amawi was involved in volumes more transcript
08:59:03 25 than Mr. El-Hindi in different conversations. In fact,

08:59:06 1 the only time they were all together was on that
08:59:07 2 February 16 -- all three of them were together was on
08:59:10 3 the February 16 meeting. So what we were left with for
08:59:13 4 Mr. Amawi was basically the lack of the tools to begin
08:59:17 5 representing him in this case.

08:59:18 6 THE COURT: Again, I don't recall. I mean,
08:59:21 7 either you or Mr. Sofer can simply make a
08:59:24 8 representation. But by the time you came into the
08:59:29 9 case, it's my recollection that a very substantial
08:59:33 10 portion of the transcripts, a very substantial
08:59:39 11 percentage of the recordings at least that the
08:59:45 12 government intended to use had been transcribed and
08:59:49 13 provided. Maybe not everything. I know there was a
08:59:55 14 fair amount of delay along the way.

08:59:57 15 MR. SOFER: Absolutely. I think the record
08:59:59 16 will reflect Your Honor pushed us pretty hard to be
09:00:02 17 producing those things early. They may not have been
09:00:05 18 perfect. And we went through numerous iterations of
09:00:07 19 them. But we're not talking about changing massive
09:00:11 20 portions of them.

09:00:12 21 THE COURT: I understand.

09:00:13 22 MR. BRYAN: Your Honor --

09:00:15 23 THE COURT: The other thing that I recall in
09:00:19 24 that regard is that during the trial there were about a
09:00:29 25 handful of instances where there was a squabble over the

09:00:35 1 accuracy of the translation either in English or in
09:00:38 2 Arabic, but certainly in English due to audibility or
09:00:42 3 other problems. I recall the one instance that you
09:00:45 4 alluded to that I didn't hear which you thought I should
09:00:49 5 hear, and there may have been a couple others like that.
09:00:53 6 But that's the way it works with transcripts, that if
09:00:57 7 there is a dispute -- because after all, as the jury is
09:01:03 8 always instructed, what they hear is what the evidence
09:01:06 9 is, at least in terms of English; and the transcript is
09:01:12 10 simply an aid or a guide. And the law is also quite
09:01:17 11 clear where the parties -- where there's a disagreement,
09:01:20 12 it's up to me to sit down and either make a decision to
09:01:23 13 let the jury hear both versions, read both versions of
09:01:26 14 the transcript, and go from there.

09:01:31 15 So again, I know that was a large volume,
09:01:34 16 but at the end of the day I look back and say: Wait a
09:01:38 17 minute; it doesn't seem to me, and in the record as it
09:01:41 18 now exists I don't think there is a vast pile of
09:01:49 19 transcripts where the contention is being raised by the
09:01:54 20 defense that's a whole jumble that's wrong; it's not
09:01:59 21 what's being said, so forth so on.

09:02:02 22 MR. BRYAN: As it relates to what the
09:02:04 23 government prepared for trial, I believe it's even said
09:02:07 24 on the record that they presented ten percent of what
09:02:10 25 they actually had as far as all of the tape recorded

09:02:12 1 conversations. I don't know how much of all of the
09:02:15 2 tape recorded conversations they actually transcribed.
09:02:19 3 They had preliminary transcripts of things they may use
09:02:22 4 during trial, and they pared it down even more. And
09:02:25 5 the late hour that we got into the case, we were trying
09:02:28 6 to familiarize ourselves with the case with the
09:02:30 7 assistance of our client, with the assistance of Mr.
09:02:34 8 Muawad, who hung over, with the assistance of Mr. Terez
09:02:37 9 from his past experience. Quite frankly we weren't in
09:02:40 10 a position to challenge a lot of transcripts that were
09:02:43 11 being played by the government because, quite frankly,
09:02:46 12 Mr. Ivey and I made the comment we were hearing the
09:02:49 13 stuff for first time. There wasn't enough time in the
09:02:52 14 day in an effort to try to prepare for the case to even
09:02:56 15 hear the tapes. In fact, the government submitted
09:02:58 16 their final transcripts the day before the trial began,
09:03:00 17 their final transcripts that were trial prep ready, the
09:03:03 18 ones that they believed were cleaned up as much as they
09:03:06 19 could.

09:03:07 20 We're not here submitting to Your Honor that
09:03:08 21 we didn't have the -- that that which was played was
09:03:13 22 inaccurate or there was a lot of problems with it.
09:03:15 23 What we're submitting to Your Honor is there was a lot
09:03:18 24 more transcript that we didn't have the ability to even
09:03:20 25 review and see.

09:03:21 1 And what the government ended up doing in
09:03:23 2 the end was quite a cut-and-paste job. And I don't
09:03:27 3 blame them in the sense they were trying to present the
09:03:29 4 case in an expeditious manner. They didn't want to put
09:03:33 5 in a bunch of irrelevant stuff.

09:03:35 6 But at the same time the government was
09:03:36 7 presenting this, we were given assurances by the Court
09:03:39 8 that, well, you have the government's entire case to
09:03:42 9 continue to prepare your defense transcript. And then
09:03:46 10 when you have, in essence, a couple of months before the
09:03:50 11 government rests --

09:03:52 12 THE COURT: It seems to me in order to have
09:03:59 13 perfected the record, but at least to be in a position
09:04:02 14 to argue persuasively either to me or to the Court of
09:04:05 15 Appeals that you were somehow prejudiced by this, and I
09:04:09 16 believe that's the standard, that you've had, what, nine
09:04:17 17 months -- eight months, nine months to sit down and say,
09:04:20 18 Judge, either this is all the stuff they didn't show, or
09:04:25 19 some of this stuff; or, Judge, this is what they gave
09:04:28 20 us, and it was wrong; or, Judge, this is what the jury
09:04:32 21 was allowed to read, and it was wrong. I mean, again,
09:04:41 22 there's -- I just don't see the transcript issue being
09:04:45 23 viable. I really don't. It's something I think the
09:04:54 24 Court of Appeals -- you can address in your arguments
09:04:58 25 there. I do think you've got to show somehow,

09:05:01 1 somewhere there was some prejudice, that the jury got to
09:05:03 2 look at something that adversely and substantially
09:05:09 3 affected your client's right to a fair trial that it
09:05:12 4 should have never seen.

09:05:13 5 I don't believe that there's a
09:05:18 6 constitutional right even to get a transcript. I'm not
09:05:21 7 sure. I certainly favor it. I think it's the right
09:05:24 8 thing to do. But where -- what is being played, even
09:05:36 9 if you are, in fact, appearing that morning or that
09:05:38 10 afternoon for the very first time, if the transcript
09:05:41 11 accurately portrays what that is, then it's a huge "so
09:05:49 12 what," I think.

09:05:50 13 MR. BRYAN: We even argued this to the jury,
09:05:52 14 that the transcript was a cut-and-paste and that it
09:05:55 15 wasn't accurate because a lot of the stuff was taken out
09:05:58 16 of context. And we were able to demonstrate some
09:06:01 17 issues of that. But what we weren't able to do
09:06:04 18 adequately is demonstrate all the issues of that.

09:06:07 19 THE COURT: That's fine. But where have
09:06:09 20 you demonstrated that? That's my whole point. I'd be
09:06:14 21 a lot more persuaded if you'd come in and give me a
09:06:17 22 stack of transcripts and say: Judge, you know, we
09:06:21 23 just -- we missed it, Judge; we didn't have time before
09:06:25 24 this recording was played to look at the chunk that Mr.
09:06:28 25 Sofer left out and dumped in the trash can, and this is

09:06:33 1 what it says.

09:06:33 2 MR. BRYAN: We raised a couple issues.

09:06:36 3 I've already alluded to the one --

09:06:39 4 THE COURT: My point is when you have
09:06:40 5 several dozen hours of recording, I think you're going
09:06:43 6 to have to do more than say there's a couple instances
09:06:47 7 where it may have been misleading in the way it was
09:06:49 8 presented by the government, and we weren't able to
09:06:51 9 catch it at the time. I mean, there were instances I
09:06:55 10 do recall when you requested and I granted the request
09:07:03 11 to have segments that had been omitted from the
09:07:06 12 government's portion presented to the jury.

09:07:09 13 My point simply is, it's been nine months
09:07:12 14 since the verdict. And I look at these motions, and I
09:07:14 15 don't see the beef, as it were, in terms of this whole
09:07:21 16 issue.

09:07:22 17 MR. BRYAN: To be honest, Your Honor, this
09:07:23 18 is still an ongoing process and our ability to even
09:07:28 19 still at this time and date to get a grasp of a
09:07:30 20 completed transcript based upon all the tapes, it's
09:07:34 21 still an ongoing process. It may even be the subject
09:07:37 22 matter of a later pleading, or maybe even a
09:07:39 23 postconviction pleading. So I think we could sort of
09:07:43 24 transition, to the other concerns that we had that are
09:07:46 25 raised in the brief as it relates to this not having

09:07:50 1 sufficient time to prepare. It's our belief that a
09:07:54 2 significant amount of irrelevant, prejudicial, or at
09:07:58 3 least 403 evidence that was much more prejudicial than
09:08:00 4 probative was able to come into the ears and eyes of the
09:08:05 5 jury without our ability to defend in kind with each one
09:08:10 6 of these individual things. And we've laid those --

09:08:13 7 THE COURT: I think you're alluding to the
09:08:17 8 motions in limine.

09:08:19 9 MR. BRYAN: And there was -- thankfully
09:08:21 10 there was a broad motion in limine requesting most of
09:08:24 11 this stuff be kept out. But if we had more time to
09:08:27 12 prepare, Your Honor, and had actually time to view some
09:08:29 13 of these videos, we would have had more persuasive
09:08:34 14 arguments why I say the Madrid train bombing shouldn't
09:08:39 15 have been played, and the London suicide bomb shouldn't
09:08:42 16 have been played, and the 9-11 conspiracy videos that
09:08:45 17 showed the towers blowing up again and again, and the
09:08:50 18 beheading video, even though that involved the Iraq war,
09:08:54 19 I think it was too gruesome to be part of this trial
09:08:57 20 because there was no evidence our clients were going to
09:09:00 21 engage in like --

09:09:01 22 THE COURT: I think those arguments are
09:09:03 23 properly raised in the Court of Appeals.

09:09:12 24 Let me address the contention about motions
09:09:15 25 in limine. Those are a convenience; they're not a

09:09:17 1 necessity. You can look through all the myriads of
09:09:22 2 rules that have been written, civil and criminal
09:09:26 3 evidence, and you won't find a provision on motions in
09:09:29 4 limine. It's a judicially created, common sense
09:09:32 5 approach to resolving issues before trial so that the
09:09:37 6 jury can be in the -- if it's in the building, it can be
09:09:41 7 in the box, we're not wasting a lot of time, so you can
09:09:45 8 see what's coming down the pike and form your responses
09:09:49 9 appropriately so you know what evidence may or may not
09:09:53 10 be coming in. But, you know, I know of no situation
09:09:57 11 with which a refusal of a Court to allow motions in
09:10:05 12 limine, for whatever reason, somehow is erroneous.
09:10:15 13 Until 20 years ago, 25 years ago, nobody heard a motion
09:10:20 14 in limine. It got invented and spread, sensibly. And
09:10:25 15 what that meant was it was up to counsel as the evidence
09:10:29 16 was being proffered to stand up and say, "Objection."
09:10:32 17 And there was lots of that. And again, I don't see the
09:10:38 18 specific examples of where pretrial consideration --
09:10:50 19 accepting your contention that you didn't have time to
09:10:55 20 develop what you think of, to investigate, to research,
09:11:02 21 to write and file motions in limine, I don't see
09:11:05 22 specific examples where you can say, Judge, here it is;
09:11:09 23 right in the middle of trial, this happened. This
09:11:13 24 specific tape or whatever, had we had chance to argue
09:11:22 25 this to you, this is the ruling that you would

09:11:27 1 necessarily have reached because this is what's wrong
09:11:29 2 with the ruling that you made.

09:11:33 3 If memory serves, I believe every bit of
09:11:40 4 videographic evidence was presented, at least to me, by
09:11:45 5 the government -- am I right, Mr. Sofer -- to look at
09:11:51 6 before voir dire.

09:11:52 7 MR. SOFER: That's right, Your Honor. Your
09:11:53 8 Honor saw this list, went through all of this video,
09:11:56 9 limited what it is the government was going to be
09:12:01 10 permitted to put in. The government limited itself
09:12:04 11 also further from the larger list that we initially put
09:12:08 12 in. Your Honor gave the jury a cautionary instruction
09:12:11 13 on numerous occasions about these videos.

09:12:15 14 THE COURT: It was a key proposition during
09:12:17 15 voir dire.

09:12:20 16 MR. SOFER: They were extensively discussed
09:12:22 17 during voir dire. There was extensive warning and
09:12:26 18 cautionary instruction given to them about the reason
09:12:29 19 that they were being introduced, being admitted as the
09:12:34 20 intent for specific defendants. And again, we're not
09:12:38 21 talking about the hope -- and I think what was missing
09:12:41 22 from the brief from counsel is particularly they cite to
09:12:45 23 a new case that came out of the Eastern District of New
09:12:48 24 York in the Second Circuit. That case is much
09:12:50 25 different. We distinguished that case in our brief.

09:12:53 1 The critical piece here is these videos were being
09:12:57 2 discussed by the defendants with Mr. Griffin during the
09:13:04 3 course of the consensual recordings. And there were
09:13:08 4 numerous times when this would occur, particularly with
09:13:13 5 Mr. Amawi. And so when the defense attacks Darren
09:13:18 6 Griffin's credibility, which they did vociferously; and
09:13:23 7 when they argue that somehow Darren Griffin entrapped
09:13:25 8 their client, which they did without formally offering
09:13:29 9 that evidence, but nevertheless; when they argue that he
09:13:32 10 was tricking Darren Griffin and suckering him into
09:13:36 11 giving him money and all this, all of these things which
09:13:40 12 they did ultimately argue, ultimately go back to that
09:13:43 13 intent issue, which was a major issue.

09:13:45 14 THE COURT: I understand. The main thing
09:13:47 15 was in terms of the videos, it wasn't as though they
09:13:51 16 sprung it on you in the midst of trial.

09:13:55 17 MR. SOFER: No. Like I said before, Judge,
09:13:57 18 this and all these issues Your Honor spent a tremendous,
09:14:01 19 as I recall -- my memory may be faulty, but we spent a
09:14:05 20 lot of time talking about this. This was not an
09:14:09 21 off-the-cuff decision by the Court.

09:14:11 22 THE COURT: Go ahead.

09:14:12 23 MR. BRYAN: I want to back up and address
09:14:13 24 the legal standards a little bit and comment on what Mr.
09:14:18 25 Sofer said in opening.

09:14:19 1 Rule 29, written motion for acquittal, the
09:14:23 2 rule provides for that within seven days we can request
09:14:26 3 for an extension of time. Also Rule 33, motions for new
09:14:30 4 trial. The reason we have those things is to give the
09:14:34 5 trial court the opportunity to address what may be --

09:14:41 6 THE COURT: Sure, it's a second look. Say,
09:14:43 7 time out, Judge, before we take the time to go down to
09:14:47 8 Cincinnati, we genuinely believe that there's a fair
09:14:52 9 chance of reversal. There was this ruling or that
09:14:55 10 decision or whatever that now that we've all had time to
09:15:05 11 look at it at arm's length and in a quieter, more
09:15:12 12 contemplative setting of one's office rather than the
09:15:16 13 courtroom, respectfully, Judge, you blew it; you made a
09:15:23 14 mistake. Admit it. Let's go back, unfortunately, and
09:15:27 15 start all over. And I understand it.

09:15:33 16 MR. BRYAN: I understand. In addition --

09:15:35 17 THE COURT: If nothing else, if you persuade
09:15:37 18 a Judge that that's true, everybody's better off, even
09:15:40 19 though the party that prevailed, in a criminal case the
09:15:44 20 government, is disappointed and distressed because if it
09:15:48 21 agrees, we go back and try the case over; we avoid that
09:15:51 22 error, and we reach a final decision sooner rather than
09:15:55 23 later.

09:15:56 24 MR. BRYAN: Ultimately, Your Honor, I think
09:16:00 25 it's about the interest of justice. And justice

09:16:03 1 delayed is justice denied. So if we have the
09:16:06 2 opportunity to fix something earlier than the Court of
09:16:08 3 Appeals has the opportunity to fix something, we, by all
09:16:11 4 means, should do that. I think that's why the rules
09:16:13 5 are there. Not only that, but Your Honor sits as a
09:16:16 6 13th juror when it comes to Rule 29. The law is very
09:16:19 7 clear on that. If Your Honor believes that the jury's
09:16:22 8 verdict is irrational on any one of these counts because
09:16:25 9 there's not just the absence of evidence, but not
09:16:28 10 sufficient evidence to prove the defendant's guilt
09:16:30 11 beyond a reasonable doubt, that's --

09:16:32 12 THE COURT: Rational trier of fact beyond a
09:16:35 13 reasonable doubt.

09:16:35 14 MR. BRYAN: That's correct. I don't want
09:16:36 15 to get away from the motion for new trial because there
09:16:38 16 is a critical issue that I want to discuss with Your
09:16:40 17 Honor, and that concerns CIPA.

09:16:42 18 But just quickly to address the Rule 29, I
09:16:45 19 would like to address in reverse order the four counts
09:16:49 20 that Mr. Amawi was convicted of.

09:16:50 21 The first one is -- in Count 4, which I'm
09:16:54 22 addressing first, is the transfer of the explosives
09:16:59 23 cookbook. This was the -- in essence on a disk that
09:17:03 24 the government discovered long after they even initially
09:17:07 25 indicted the case. In fact, this count only came in

09:17:10 1 the superseding indictment well after the original
09:17:13 2 indictment was made.

09:17:15 3 THE COURT: That's the printed material in
09:17:17 4 Arabic rather than the bomb vest video?

09:17:20 5 MR. BRYAN: That's correct, Your Honor.

09:17:21 6 This is Government's Exhibit 59, which was the disk that
09:17:24 7 that information was located upon. On that disk was
09:17:29 8 106 files, the vast majority of them actually in Arabic;
09:17:34 9 there's some that are in English as well. And the one
09:17:37 10 in question actually, Your Honor, is subject T, and it
09:17:45 11 says "Zip" in front of it, but then there's something
09:17:48 12 written in Arabic. And the actual file, in essence, is
09:17:52 13 multiple pages of this, which is a bunch of Arabic.

09:17:57 14 There used to be a no evidence standard when
09:17:59 15 it came to sufficiency of evidence. If there was no
09:18:02 16 evidence of guilt on a particular case, then the Court
09:18:06 17 should issue a ruling in favor of the defendant
09:18:09 18 acquitting him of that. I think Your Honor, as it
09:18:11 19 relates to Count 4, we may be as close to and "no
09:18:14 20 evidence" standard as I've ever been in a case, and that
09:18:17 21 is because of over 300 hours of audiotape, of over five
09:18:22 22 weeks of Darren Griffin testifying on the witness stand,
09:18:25 23 not one time did anybody ever make mention of this --
09:18:31 24 this file that was found on this disk that was received
09:18:33 25 purportedly from Darren Griffin, from Mohammad Amawi to

09:18:38 1 Darren Griffin. And we don't squabble with the
09:18:42 2 standards. We understand Your Honor has to view the
09:18:46 3 evidence in a light most favorable to the government.
09:18:49 4 But viewing the evidence in a light most favorable to
09:18:52 5 the government, you can't reach evidentiary conclusions
09:18:54 6 that don't exist. The intention is to show that
09:18:57 7 Mohammad Amawi transferred this item with the intent
09:19:00 8 that Darren Griffin use it in a crime of violence. And
09:19:02 9 the government's argument is, well, because he intended
09:19:06 10 Darren Griffin to assist in committing Jihad abroad,
09:19:11 11 anytime he gave him anything, he intended to do that.
09:19:13 12 But if that were the case, as it relates to this
09:19:15 13 particular item, there should be some other evidence
09:19:18 14 that either Mohammad Amawi discussed it with Darren
09:19:20 15 Griffin and he intended to interpret it for him --
09:19:23 16 THE COURT: You're saying the transmission
09:19:25 17 from one to the other in this form and format --
09:19:29 18 MR. BRYAN: -- is not sufficient evidence to
09:19:32 19 prove beyond a reasonable doubt to any rational trier of
09:19:36 20 fact.
09:19:37 21 THE COURT: Can you do me the favor -- and
09:19:39 22 I'll give you a couple weeks to do it, or a week or
09:19:43 23 whatever -- list for me the transcript pages where this
09:19:49 24 item was under -- where there's testimony about this
09:19:57 25 item. Because I can't recall with any degree of

09:20:02 1 specificity.

09:20:03 2 MR. BRYAN: We can do that. But Darren
09:20:04 3 Griffin didn't -- he testified about receiving the disk
09:20:06 4 but never testified about actually viewing this document
09:20:10 5 or Mohammad Amawi translating it for him, or anybody for
09:20:14 6 that matter translating for him, or Mohammad Amawi
09:20:16 7 telling him: Hey, there's an Arabic document --

09:20:19 8 THE COURT: Again, give it to somebody
09:20:22 9 except for the FBI.

09:20:24 10 MR. BRYAN: Right. Then the FBI, when
09:20:26 11 they're translating this months after the fact, they
09:20:29 12 find what appears to be, quote, the explosives cookbook,
09:20:35 13 which is instructions in Arabic for how someone could
09:20:37 14 make chemical explosives. Then they come back, and
09:20:40 15 they supersede the indictment and say ah-ha; he
09:20:44 16 transferred this for the damage it would --

09:20:48 17 THE COURT: If you could compile for me and
09:20:50 18 simply submit that segment of the transcript in which
09:20:55 19 any and all evidence as to that count is found.

09:21:02 20 MR. BRYAN: We will do that, Your Honor.

09:21:05 21 Moving on now to Count 3, in reverse order.

09:21:09 22 MR. SOFER: I don't know if you want us to
09:21:12 23 wait until the end.

09:21:13 24 THE COURT: I'll wait.

09:21:15 25 MR. BRYAN: Count 3 is the alleged

09:21:18 1 distribution, or apparently since he was convicted, the
09:21:21 2 distribution of the bomb vest video with the intent Mr.
09:21:26 3 Griffin was going to use that for furtherance of a crime
09:21:29 4 of violence. What's important is the evidence in the
09:21:32 5 case as it related to this distribution because we all
09:21:35 6 know that the evidence is clear that there was not an
09:21:37 7 actual distribution, that is, a physical handing over of
09:21:41 8 this video from Mr. Amawi to Mr. Griffin. The best
09:21:45 9 that the government has in that regard is Mr. Amawi
09:21:48 10 giving a disk to Mr. Griffin purportedly and saying:
09:21:51 11 Oh, yeah, the video is on there. But the forensic
09:21:54 12 evidence is clear the video was not on there. So
09:21:57 13 they're relying now, viewing of that video --
09:21:59 14 THE COURT: I think I've already ruled on
09:22:01 15 that. In fact, I ruled before trial. In my view,
09:22:07 16 showing it on the screen, even if you don't give him a
09:22:09 17 disk, that counts as distribution.
09:22:11 18 MR. BRYAN: Again, Your Honor, and we don't
09:22:12 19 dispute the distribution finding of that. What we're
09:22:15 20 arguing is that again --
09:22:18 21 THE COURT: At least not now.
09:22:19 22 MR. BRYAN: Well, we did argue that before,
09:22:21 23 and I apologize for that.
09:22:22 24 THE COURT: That's fine.
09:22:23 25 MR. BRYAN: But again, with the intent that

09:22:25 1 by viewing that video, Mr. Amawi was trying to transfer
09:22:29 2 to Darren Griffin the knowledge so that he could go out
09:22:33 3 and use it for a crime of violence, that intent also,
09:22:38 4 again, is missing. We would ask Your Honor to review
09:22:40 5 the testimony concerning the January 10 viewing of that
09:22:43 6 video because on that same date and time, this was what
09:22:46 7 I call the marathon video viewing party that Darren
09:22:50 8 Griffin and Mohammad Amawi had, we begin on January 10
09:22:54 9 and heading over into January 11 where they watched
09:22:59 10 multiple hours of videos and had multiple discussions
09:23:02 11 concerning the topics that were on these videos.

09:23:06 12 These videos included the conversation of a
09:23:08 13 young woman who -- it was basically Mr. Amawi showing
09:23:13 14 Mr. Griffin everything that was on his computer of a
09:23:15 15 woman who purportedly died during sex because she was
09:23:18 16 sinning against God, and she died during sex.

09:23:21 17 There was a discussion concerning a French
09:23:25 18 Barbie doll that was pregnant, and how offensive it was
09:23:28 19 to Mohammad that the French would allow a French Barbie
09:23:31 20 doll that is pregnant and has a little baby, but they
09:23:33 21 won't allow a Barbie doll that's wearing the Muslim
09:23:38 22 hajib or the veil. So there were discussion about the
09:23:41 23 veil.

09:23:41 24 They were basically having religious
09:23:43 25 discussions. On this same date and time Mr. Amawi was

09:23:46 1 talking on Pal Talk to the people in his chat room and
09:23:49 2 discussing with Darren Griffin what they were talking
09:23:51 3 about.

09:23:52 4 What they didn't discuss, what is clear and
09:23:54 5 what is missing from the evidence, is Mr. Amawi saying
09:23:56 6 to Mr. Griffin, I'm showing you this video so that you
09:24:01 7 can go make this bomb vest and go out and blow people
09:24:05 8 up. Again, government wants us to infer that that's
09:24:07 9 what Mr. Amawi intended by showing Darren Griffin that
09:24:10 10 video. But again, viewing the evidence, even the
09:24:13 11 evidence in the light most favorable to the government,
09:24:15 12 what you have at most is speculation that that could be
09:24:19 13 used for that purpose as well, but no specific evidence.

09:24:22 14 THE COURT: For that purpose or some more
09:24:24 15 general purpose in terms of providing the training and
09:24:29 16 getting them prepared to do what the government contends
09:24:33 17 they wanted to do, which was to metastasize a bunch of
09:24:39 18 cells or go overseas or whatever.

09:24:41 19 MR. BRYAN: Well, the training says that the
09:24:43 20 material has to be transferred with the intent that the
09:24:46 21 material is going to be used in a crime of violence.
09:24:48 22 So if the government is submitting that that was going
09:24:51 23 to be used to train people to go kill and maim, I would
09:24:56 24 want to deny that that would satisfy that element if
09:24:58 25 that was the evidence at that time. But the evidence

09:25:01 1 based upon this meeting on that date in question, when
09:25:04 2 you look at it in its proper context, this is a marathon
09:25:08 3 video viewing. What Darren Griffin was trying to do --

09:25:11 4 THE COURT: My problem with that, quite
09:25:12 5 candidly, is I think that tends to take that session and
09:25:16 6 try to isolate it and encapsulate it and view it as
09:25:25 7 though it had no connection or relationship to what went
09:25:28 8 before or after. I assume that's the government's
09:25:32 9 contention.

09:25:32 10 MR. BRYAN: Well, what went before -- again,
09:25:35 11 this is before February 16 when the three got together.
09:25:39 12 It was after a couple times that Wassim Mazloum was
09:25:44 13 introduced to Darren Griffin, who was introduced in, I
09:25:47 14 believe, November for the first time to Darren Griffin.
09:25:51 15 But again, I don't believe you can take it out of the
09:25:53 16 context in which the video was transferred. What the
09:25:56 17 government, I think, through their agents at the time
09:25:58 18 were trying to do was to clean up this count by having
09:26:02 19 Darren Griffin request Mr. Amawi to give it to him
09:26:05 20 again, saying they never got it, that I need you to copy
09:26:08 21 it; I need you to give it to me.

09:26:10 22 Again, we argued to the jury -- and again, I
09:26:13 23 agree with Mr. Sofer that Your Honor doesn't have to
09:26:15 24 accept our representation, in fact, Your Honor can't.
09:26:19 25 Your Honor has to view the evidence in the light most

09:26:22 1 favorable to the government that maybe Mr. Amawi just
09:26:24 2 couldn't or failed in his ability to be able to do the
09:26:27 3 simple task of transferring this video onto a disk for
09:26:31 4 Darren Griffin. It's our -- considering Mr. Amawi's
09:26:34 5 computer savvy, there's no reasonable belief that that
09:26:37 6 could have been the case. But even if Your Honor
09:26:39 7 assumes that, the focus has to be on what was happening
09:26:42 8 on January 10 and not all of this stuff afterwards
09:26:46 9 because there was never a transfer afterwards.

09:26:49 10 And in the element -- the two elements don't
09:26:51 11 meet; transfer with the intent don't meet. And you
09:26:53 12 can't give a future or a future intent, can't relate
09:26:58 13 back to what happened at the time of the transfer. And
09:27:01 14 that's what we argued in our brief and our reply brief
09:27:04 15 to the government's response. And I'd ask Your Honor
09:27:06 16 to reread our reply to the government's response or
09:27:09 17 reread that issue in that regard; that, in essence, what
09:27:12 18 the government is saying is they could demonstrate the
09:27:16 19 intent from what happened after the fact. But it's our
09:27:18 20 argument that you can only look to intent of what was
09:27:21 21 happening either on that day, or admittedly maybe before
09:27:24 22 that day to see what kind of history they had together
09:27:27 23 before viewing this video. But I think the evidence is
09:27:31 24 overwhelming that all they were doing was viewing videos
09:27:34 25 like they were viewing the Barbie videos and everything

09:27:37 1 else, and it wasn't being viewed with the criminal
09:27:40 2 intent that it be used in some future purpose.

09:27:42 3 Transitioning now to the main counts against
09:27:45 4 Mr. Amawi, which are the conspiracy count, what we're
09:27:48 5 arguing is that the government failed to prove beyond a
09:27:50 6 reasonable doubt not only an agreement, but an intent to
09:27:56 7 kill or maim at any time that wasn't supported by --
09:28:01 8 that wasn't in addition to just a general desire to
09:28:04 9 learn self-defense techniques.

09:28:06 10 And we briefed quite a bit in our brief
09:28:09 11 about D.C. v. Heller, the Supreme Court's decision on
09:28:13 12 the Second Amendment, saying that's an individual right
09:28:16 13 and not a state's right or not a right for the states to
09:28:19 14 maintain a militia. That goes back to the natural
09:28:23 15 right of self-preservation.

09:28:25 16 We believe the evidence is overwhelming that
09:28:26 17 the government doesn't have any problem proving that Mr.
09:28:29 18 Amawi and others wanted to learn how to defend
09:28:32 19 themselves, learn how to fight, or maybe even learn how
09:28:35 20 to use combat tactics. But what this case is missing,
09:28:39 21 Your Honor, is an agreement to do anything specific at
09:28:42 22 any time in any place. There is no condition present
09:28:45 23 that would take this general desire, which is protected
09:28:49 24 by the Second Amendment, to learn how to defend oneself,
09:28:54 25 and even the First Amendment, the desire to learn, how

09:28:57 1 to learn to research and learn how bombs are created and
09:29:00 2 how they're made and all that stuff, and to put that
09:29:03 3 into play sometime. It doesn't have to -- I'm not
09:29:06 4 saying they have to have a specific time, but there had
09:29:09 5 to have been a definite intent on the participant's part
09:29:13 6 to put that into play in a criminal manner; that is to
09:29:16 7 kill or maim American citizens, people abroad, or to
09:29:20 8 provide material support. And I don't think there's
09:29:24 9 any evidence that there was an agreement amongst any of
09:29:27 10 the defendants, that there was an intent or an agreement
09:29:29 11 to go out and kill anybody, notwithstanding the fact
09:29:33 12 that they wanted to learn how to fight if the situation
09:29:37 13 ever presented itself.

09:29:38 14 What if we're ever back in Lebanon, for Mr.
09:29:42 15 Mazloum, or back in our home in Jordan; people start
09:29:45 16 pulling us out of our houses; how do we defend
09:29:49 17 ourselves? In light of what happened in the world at
09:29:51 18 that time, there's a lot of conversation about not being
09:29:54 19 able to fight. They wouldn't know how to use a gun to
09:29:56 20 protect their mother. They'd have to throw the gun
09:29:59 21 down and pick up a kitchen fork or knife. So you can't
09:30:03 22 separate that desire to learn how to fight with a goal.
09:30:07 23 There was no articulated goal. And all that was within
09:30:14 24 the power of the government to do because they were the
09:30:17 25 ones, through Darren Griffin, who were in essence

09:30:20 1 creating this cell, creating this conspiracy. They
09:30:23 2 could have been less equivocal about it. He could have
09:30:26 3 made it clear. He could have said, well, we're going
09:30:28 4 to do this today, then we're going to do this tomorrow.
09:30:31 5 We're going to go kill American soldiers tomorrow. I
09:30:34 6 believe it was left purposely vague because they wanted
09:30:37 7 to be able to carry on the investigation as long as they
09:30:41 8 did. If Darren Griffin stepped forward and he said:
09:30:43 9 Well, we're going to go tomorrow to Iraq and put our
09:30:46 10 training to use; or, we're going to go to the Middle
09:30:48 11 East tomorrow and join up with our brothers and become
09:30:51 12 involved in an Al-Qaeda training center -- they could
09:30:55 13 have done all those things, and they chose to keep it
09:30:58 14 purposely vague.

09:30:59 15 So what we have is people engaged in
09:31:03 16 otherwise protected activity of the Arabic descent,
09:31:07 17 Muslim descent, showing, admittedly, cheerleading for
09:31:10 18 the other side, our enemy across seas, and learning how
09:31:14 19 to fight. But without the specific plan, I don't
09:31:17 20 believe the government can prove the essential elements
09:31:19 21 of the agreement and conspiracy.

09:31:20 22 As it relates to material support, the
09:31:23 23 government was allowed to -- in their briefing there's
09:31:26 24 discussion on the -- on the 16th, February 16th, about
09:31:30 25 what do they need? What do the brothers need in Iraq?

09:31:34 1 Well, someone said they need fighters. Someone said
09:31:36 2 they don't need fighters; they need weapons. Someone
09:31:39 3 said they don't need fighters or weapons; they need
09:31:43 4 money. So they discuss what the people they're cheering
09:31:46 5 for in Iraq need. But what is lacking from that
09:31:48 6 discussion is a plan on their part how they're going to
09:31:52 7 then go about doing it.

09:31:53 8 The government doesn't have to prove that
09:31:55 9 they did it; they don't have to prove that they sent a
09:31:59 10 red cent, but they have to prove they had a plan to
09:32:01 11 either provide a weapon or provide whatever support in
09:32:07 12 the manner of training, even to provide material support
09:32:10 13 to people abroad.

09:32:11 14 That's where the government responds: The
09:32:14 15 Syrian. In their motion, their reply brief to our
09:32:18 16 motion for acquittal, they say, Well, we have something
09:32:21 17 more than general talk; we have Mr. Amawi communicating
09:32:24 18 with the Syrian brother, talking about trying to get him
09:32:27 19 Astrolite through Darren Griffin.

09:32:29 20 For Rule 29 purposes I will comment that the
09:32:31 21 evidence is clear from the record, the government never
09:32:33 22 established that Mr. Amawi did, in fact, put this person
09:32:36 23 from -- this purported person from Syria in contact with
09:32:41 24 Mr. Griffin, their supplier. The evidence was that
09:32:43 25 they were trying to swap e-mail addresses and things

09:32:46 1 like that. The government never presented any evidence
09:32:49 2 whatsoever that that occurred. But they implied that
09:32:51 3 it occurred. And the government, in response to our
09:32:55 4 motion for new trial, somehow tries to say that somehow
09:32:59 5 we injected the Syrian in the case through Mr. Ivey's
09:33:03 6 cross-examination. Nothing could be further from the
09:33:06 7 truth. From the opening statement the government
09:33:07 8 injected the Syrian into this case.

09:33:10 9 My transition now, Your Honor, is I'm going
09:33:13 10 away from judgment of acquittal as it relates to this,
09:33:16 11 and now I'm going to relate it the motion for a new
09:33:19 12 trial. And that relates to what I think is the
09:33:21 13 critical issue that if Your Honor is considering the
09:33:24 14 interest of justice, that maybe not just Your Honor and
09:33:28 15 the government, maybe we all didn't get it right the
09:33:31 16 first time around, and that is as to how the Court and
09:33:35 17 how the government dealt with classified information
09:33:39 18 using CIPA and the Classified Information Procedures
09:33:42 19 Act. There's no doubt in my mind, although I have to
09:33:47 20 say -- admit that this is a little bit of speculation,
09:33:50 21 that the government's CIPA evidence concerned this
09:33:53 22 purported Syrian in Iraq because the government would be
09:33:57 23 derelict in their duty if they wouldn't have followed up
09:34:01 24 on that lead, and whether through the State Department
09:34:03 25 or through the CIA or through Syrian intelligence

09:34:06 1 themselves tried to find out who this individual was,
09:34:09 2 determine if this individual was a serious insurgent or
09:34:12 3 insurgent backer and to try to stop him in his tracks
09:34:18 4 from doing anything that would harm our soldiers abroad.
09:34:21 5 They would be derelict if they didn't do that. So we
09:34:23 6 have good reason to believe they investigated the heck
09:34:27 7 out of the Syrian lead and, in fact, did so long before
09:34:29 8 the case began, and they had available to them things
09:34:33 9 concerning this Syrian that we were never able to get
09:34:36 10 through independent means. And we tried. And the
09:34:39 11 Court is well aware that we tried on numerous occasions
09:34:42 12 not only through Brady motions to compel discovery, but
09:34:45 13 also through our own investigative tools through
09:34:48 14 subpoenaing internet service provider records that Your
09:34:51 15 Honor denied our request to get those records through
09:34:53 16 the power of subpoena saying that we didn't fit under
09:34:56 17 the statute as a government act --

09:34:59 18 THE COURT: I think what you're doing is
09:35:01 19 saying essentially in these sessions -- the record is as
09:35:09 20 it is. Again, I think it's an argument to be addressed
09:35:13 21 to the Court of Appeals. I know there were a lot of
09:35:15 22 them. That's all I can say about them.

09:35:20 23 MR. BRYAN: I think what we did, Your Honor,
09:35:21 24 and at the time I don't blame the defense as much as I
09:35:25 25 would respectfully blame the government in this regard,

09:35:29 1 CIPA means it's classified information. And what that
09:35:32 2 means is the government can't have their cake and eat it
09:35:35 3 too. They can't inject some evidence concerning other
09:35:38 4 evidence that they know to be classified and try to get
09:35:41 5 the benefit of that, at the same time withholding our
09:35:45 6 opportunity to investigate it completely. And our
09:35:48 7 argument in our pleadings -- and I believe it even
09:35:52 8 stronger now -- that totally undermines the adversarial
09:35:55 9 system of justice because they're privy to information
09:35:58 10 we don't have the ability to be privy too, even though
09:36:00 11 we're trying. We even had Mr. Terez on the border of
09:36:04 12 Syria the last time he went over there in an effort to
09:36:07 13 see if he could make contact with whose telephone number
09:36:10 14 appeared to be a Syrian number.

09:36:12 15 Husamtarsha@hotmail.com [phonetically], I
09:36:20 16 sent him e-mails trying to interact with this person who
09:36:23 17 was purportedly the person Mr. Amawi had interacted
09:36:26 18 with. I think by the time we became involved in this
09:36:29 19 case, Husam Tarsha had already been dealt with, and the
09:36:32 20 matter of Husam Tarsha had been dealt with by the
09:36:35 21 government. But I don't have a problem with them for
09:36:37 22 national security interest withholding classified
09:36:40 23 information from the public and from the jury. What I
09:36:43 24 do have a problem with is that we weren't able to be
09:36:45 25 part of the process.

09:36:48 1 THE COURT: Again, I'm not sure that those
09:36:51 2 are arguments properly addressed to me because I believe
09:36:54 3 that I acted properly within the constraints of the
09:36:57 4 statute and the system as we have it. And again,
09:37:03 5 reasonable men will disagree about the application of
09:37:06 6 CIPA, which was invented in response to graymail to
09:37:14 7 every scrap of information that the government stamps
09:37:18 8 classified on, and there we are. I think that's an
09:37:22 9 argument that has to be addressed to the Sixth Circuit
09:37:25 10 and perhaps ultimately Congress.

09:37:27 11 MR. BRYAN: One of the issues we raised,
09:37:29 12 Your Honor, was the ability of the defense to
09:37:30 13 participate in it. Classified information doesn't
09:37:33 14 necessarily have to be kept from defense attorneys.

09:37:36 15 THE COURT: I understand that.

09:37:37 16 MR. BRYAN: We have to demonstrate a need to
09:37:39 17 know. And that still doesn't mean that we're going to
09:37:41 18 publish it to the public. We have to demonstrate a
09:37:44 19 need to know. We needed to know in this case because
09:37:46 20 the government chose to use evidence regarding the
09:37:49 21 Syrian against Mohammad Amawi. We needed to know. We
09:37:52 22 needed to be part of the process. We needed to be able
09:37:55 23 to come into chambers with Your Honor under the
09:37:58 24 Classified Information Procedures Act because there's
09:38:01 25 nothing in that Act that says defense attorneys don't

09:38:03 1 have a right to know.

09:38:04 2 THE COURT: Let me ask you this: What if,
09:38:06 3 hypothetically, there was nothing in any of those
09:38:12 4 sessions that had anything to do with anybody from Syria
09:38:17 5 or Astrolite or bomb making or whatever?

09:38:20 6 MR. BRYAN: Well, then I don't think I
09:38:22 7 really have much of an argument, Your Honor, to be
09:38:24 8 honest with you.

09:38:25 9 THE COURT: Okay. And the record is as it
09:38:27 10 is, and the Court of Appeals will be able to look at
09:38:30 11 that record and determine whether that's an accurate
09:38:33 12 statement or not. I'm not trying to say it is one way
09:38:35 13 or the other. I'm asking purely hypothetically.

09:38:38 14 MR. BRYAN: And I would acknowledge
09:38:40 15 hypothetically that unless there's other evidence that
09:38:45 16 doesn't touch upon anything that the government
09:38:48 17 introduced -- what I'm arguing as it related to the
09:38:52 18 Syrian is that became a matter in this trial. If it
09:38:54 19 didn't become a matter in this trial, and if there was
09:38:57 20 other evidence and it was in some way exculpatory to Mr.
09:39:00 21 Amawi, like I know they were listening to Amawi's cell
09:39:03 22 phone conversations; they were also listening to his
09:39:06 23 satellite phone conversation. If on those satellite
09:39:10 24 phone conversations Mr. Amawi is saying Darren Griffin
09:39:12 25 is working for the government, and I'm just trying to

09:39:14 1 rip him off, I'm going to take him as far as I can and
09:39:18 2 get as much money from him as I can, if the government
09:39:22 3 is privy to that, that would be exculpatory under Brady.
09:39:26 4 But if they say it's classified, so we're not going to
09:39:29 5 reveal it to you, then Your Honor has to make a
09:39:33 6 balancing act. Personally I think the interest of
09:39:35 7 justice trumps that.

09:39:36 8 THE COURT: What I'm saying, Mr. Bryan --
09:39:39 9 we're going to have to wind this up fairly soon -- the
09:39:42 10 record is as it is. It will be reviewed by the Court of
09:39:46 11 Appeals. And I have no doubt that they will review it
09:39:49 12 with a careful and cautious eye. And if they conclude
09:39:53 13 that anything was disclosed in the course of those
09:39:56 14 proceedings which I should not have kept from you, I
09:40:04 15 should not have kept from you in the version -- in its
09:40:08 16 raw state rather than its filtered state, if that
09:40:10 17 happened, they'll make that decision.

09:40:14 18 MR. BRYAN: Understood, Your Honor.

09:40:17 19 Just in response to something Mr. Sofer said
09:40:20 20 earlier, this is a new argument that hasn't been raised
09:40:23 21 before the Court before as it relates to this motion for
09:40:25 22 new trial. It was raised for the first time in a motion
09:40:28 23 for new trial that it's our interpretation of CIPA that
09:40:31 24 the government should take an alternate approach. And
09:40:35 25 that is if they believe certain evidence should be

09:40:37 1 classified, they shouldn't be able to release any
09:40:39 2 evidence or introduce any evidence related -- directly
09:40:42 3 related to that classified evidence. If they want to
09:40:45 4 keep it classified, we could have tried this case
09:40:47 5 without the reference to the Syrian, without any
09:40:51 6 reference to Astrolite. We could have tried -- and the
09:40:53 7 case against Mr. Mazloum and Mr. El-Hindi went forward.

09:40:57 8 THE COURT: That's not my understanding how
09:40:59 9 the CIPA process works. That's not my understanding of
09:41:06 10 how it works. I think I made clear, and I think the
09:41:14 11 government would concur that I was very uncomfortable
09:41:17 12 with any ex parte communication. It's not the way I
09:41:20 13 was brought up as a common law lawyer. But that's the
09:41:26 14 system that Congress has created. My discomfort with
09:41:36 15 ex parte proceedings, all of which was, in fact, on the
09:41:41 16 record, every word of which was on the record, may even
09:41:51 17 exceed yours. But I can't allow that discomfort to
09:41:54 18 displace my understanding of what I was required to do
09:41:58 19 when presented with that choice.

09:42:02 20 MR. BRYAN: I understand, Your Honor.
09:42:03 21 Inasmuch as it may have been Your Honor's interpretation
09:42:05 22 of what Congress wanted you to do, then my problem is
09:42:08 23 with CIPA itself, is that it undermines the adversarial
09:42:14 24 process. That is --

09:42:15 25 THE COURT: I don't think in light of the

09:42:18 1 rulings that are out there on CIPA I can ignore the
09:42:26 2 system as it is. Those are arguments for the Sixth
09:42:31 3 Circuit, perhaps the Supreme Court.

09:42:32 4 MR. BRYAN: Just to finish, Your Honor, the
09:42:35 5 classified nature of CIPA can be satisfied by defense
09:42:39 6 attorneys who participate with security clearances.
09:42:41 7 That's how we're litigating Guantanamo. The defense
09:42:45 8 attorneys have just as much right to see the classified
09:42:47 9 information as the government. That puts them on equal
09:42:50 10 footing with the government when it comes to making
09:42:52 11 their arguments.

09:42:53 12 THE COURT: Candidly, if I were designing
09:42:55 13 the system, I would design the system a lot different
09:42:58 14 than the one Congress did. I would say, fine, go get
09:43:01 15 the clearance. And indeed, I would say, if I could, by
09:43:07 16 the way, a declination of clearance, you're going to
09:43:12 17 have to show me cause as to why you turned that person
09:43:16 18 down, and I'm going to independently review that and see
09:43:20 19 whether I think he's trustworthy even though whatever or
09:43:23 20 why ever. I agree with you there; you can trust
09:43:32 21 counsel. But again, that's not the system that I found
09:43:36 22 I was dealing with or that I could do anything about.
09:43:42 23 I may be wrong, in which case candidly I wouldn't be too
09:43:48 24 distressed to hear. But that's neither here nor there.

09:43:52 25 MR. BRYAN: Well, if Your Honor's

09:43:54 1 interpretation is correct, I think the system does
09:43:58 2 undermine notions of fairness that are within the due
09:44:01 3 process clause.

09:44:02 4 THE COURT: I think it has consequences that
09:44:04 5 are not desired. But I don't think that I can, in
09:44:10 6 accordance with my oath, shrug my shoulders and say I'm
09:44:15 7 not going to abide by what I understand I have to abide
09:44:19 8 by. And if anything, that kind of gesture and response
09:44:25 9 of the Judge, I think, would be far more dangerous than
09:44:29 10 the limited incursion into the integrity of the
09:44:34 11 adversary process that CIPA does have. That was how I
09:44:40 12 viewed what was going on. And I believe Mr. Sofer and
09:44:44 13 you will have a chance to talk to the Sixth Circuit
09:44:46 14 about that.

09:44:47 15 MR. BRYAN: Thank you.

09:44:47 16 THE COURT: Let me just say a couple things
09:44:49 17 before you sit down. On the replaying of the
09:44:57 18 recordings, I think to some extent there were no
09:45:04 19 concurrent objections, in which case that's waived.
09:45:12 20 And otherwise I think I tried to be as attentive as
09:45:15 21 possible to the sort of double or triple barreled impact
09:45:20 22 that that can have. I actually expressed elsewhere a
09:45:26 23 concern with that, as other courts have had, but I don't
09:45:30 24 see any error in that.

09:45:37 25 The other issue is that at the request of

09:45:47 1 the defense, as you pointed out, to inform me and to
09:45:55 2 inform my review of the classified material, counsel did
09:46:02 3 meet with me and laid out then what were their
09:46:07 4 perceptions of the case and how they were trying to
09:46:10 5 formulate their response and prepare for it. And I
09:46:19 6 assume you're aware that I'd done that, and there could
09:46:22 7 have been but was not a request to do likewise once you
09:46:26 8 were in the case or to go back and review those
09:46:32 9 sessions, which I could have done, could have had a
09:46:36 10 transcript prepared or whatever, with an eye to
09:46:45 11 reconsidering my decision to accept what the government
09:46:50 12 was doing in light of whatever perspective you had on
09:46:55 13 the case. And candidly, by hindsight it doesn't seem
09:47:01 14 to me that what happened ultimately varied from what had
09:47:09 15 been rejected by the defense. It varied to some extent,
09:47:17 16 but the variance was not such that necessitated a
09:47:24 17 reconsideration of my rulings on CIPA.

09:47:28 18 MR. BRYAN: Your Honor, just briefly as it
09:47:31 19 relates to waiver on the other issues, I believe if it
09:47:34 20 wasn't our counsel, I think Mr. Boss raised a continuing
09:47:39 21 objection to that in his motion in limine. And I
09:47:43 22 believe -- so I don't believe that --

09:47:45 23 THE COURT: I hope it's preserved in the
09:47:47 24 record.

09:47:47 25 MR. BRYAN: I believe it is.

09:47:49 1 THE COURT: I really try to make sure
09:47:54 2 anything possible is preserved in the record. I don't
09:47:58 3 like the situation where counsel -- again, the battle in
09:48:07 4 the courtroom gets distracted and fails to preserve an
09:48:10 5 objection. I would rather have counsel -- there have
09:48:14 6 been times when I have actually said -- have undertaken
09:48:18 7 sua sponte to preserve something for the record so that
09:48:21 8 if I made a mistake, fine.

09:48:24 9 MR. BRYAN: That's clearly our perception as
09:48:26 10 well, Your Honor.

09:48:27 11 As it relates to our ability to convey to
09:48:30 12 Your Honor the theory of our defense so that Your Honor
09:48:34 13 would be privy to that when you're viewing CIPA
09:48:37 14 material, it is true, and I think the record needs to be
09:48:42 15 clear, we weren't part of that original meeting.

09:48:44 16 THE COURT: I know you weren't.

09:48:46 17 MR. BRYAN: And as it related to our failure
09:48:48 18 to request an additional meeting, I would just chalk
09:48:51 19 that up to again coming into the case at a late hour and
09:48:53 20 trying to get caught up to speed. I do recall several
09:48:56 21 times during the course of trial instead of
09:49:01 22 challenging -- instead of challenging it on the basis of
09:49:04 23 CIPA or under the CIPA statute, standing up and arguing
09:49:10 24 Brady arguments not only during the government's case,
09:49:12 25 but before. I remember the specific instance, but

09:49:15 1 before we began our case in chief, making another Brady
09:49:18 2 request on the record outlining the information that I
09:49:22 3 believe that the government had at that time that we
09:49:24 4 believed was helpful to the defense. And that, I
09:49:28 5 think, is clear for the record as well. Thank you,
09:49:30 6 Your Honor.

09:49:34 7 THE COURT: Mr. Sofer, why don't you take a
09:49:37 8 couple minutes to respond.

09:49:38 9 MR. SOFER: I'll be very brief, to the
09:49:40 10 extent I'm capable of that, Your Honor.

09:49:44 11 Again, going back to where we started, none
09:49:47 12 of this is new. It disturbs me a little bit, Your
09:49:51 13 Honor, that you're willing to take further transcripts,
09:49:54 14 for instance, on the passing of the explosives cookbook,
09:49:58 15 which we called it. I'd ask that we be permitted to
09:50:02 16 make a response to that as well.

09:50:04 17 THE COURT: Of course.

09:50:05 18 MR. SOFER: I recall this specifically.
09:50:07 19 This was argued at the time, argued in front of the
09:50:10 20 jury. This is not new either.

09:50:11 21 THE COURT: My recollection isn't that firm,
09:50:14 22 and I'd rather look -- I'd rather rely upon the printed
09:50:21 23 word to refresh my recollection rather than kind of say,
09:50:25 24 oh, yeah, it's okay in the record.

09:50:26 25 MR. SOFER: Absolutely fair. But I guess

09:50:28 1 what I'd like to say is we argued to you and to this
09:50:31 2 jury that the passage, for instance, of these disks, you
09:50:36 3 cannot look at it in a vacuum. Your Honor said that
09:50:38 4 with respect to the bomb vest video in response to
09:50:41 5 defense counsel's argument. The same is true of all of
09:50:44 6 this. It's just not fair to try to take one of these
09:50:47 7 things out and say: Here are all the times that it's
09:50:50 8 mentioned. You have to look at the context of the
09:50:53 9 case. We could also submit transcript sections, but
09:50:57 10 then we'd be submitting to Your Honor the whole case
09:50:59 11 again. I don't want to go back and relitigate it.

09:51:02 12 THE COURT: I just -- maybe I'll give them
09:51:05 13 until a week from this Friday to give me the excerpts,
09:51:12 14 and then I don't want you to bring me a wheelbarrow full
09:51:19 15 of transcripts, but say, Judge, here are other
09:51:23 16 instances. Very brief. And primarily, as I say, so I
09:51:28 17 can make my mind up about that aspect of the argument.

09:51:33 18 MR. SOFER: I think we can point Your Honor
09:51:35 19 to part of the trial transcript where you made this
09:51:38 20 decision the first time and what your rationale was,
09:51:40 21 which we obviously agreed with at the time.

09:51:45 22 The crux ultimately of much of this argument
09:51:49 23 is -- goes back to this notion that counsel did not have
09:51:52 24 enough time to prepare for the case. And we are very
09:51:56 25 confident that the record in this case supports what

09:51:58 1 Your Honor did.

09:51:59 2 THE COURT: Not only that, but the law --
09:52:04 3 there are countless instances of rather astonishingly
09:52:09 4 brief periods of time in very serious cases, even in
09:52:13 5 capital cases where what the Court did, the trial court,
09:52:23 6 I think most of us lawyers are troubled and astonished,
09:52:27 7 yet the appellate courts say -- what I did and why I did
09:52:35 8 it, I tried to lay it all out for the record.

09:52:38 9 MR. SOFER: I don't want to rehash that,
09:52:40 10 Your Honor. What the government, though -- I think the
09:52:43 11 record is incomplete in one way. And that's what I
09:52:47 12 want to get at. As you say, Your Honor, the record is
09:52:49 13 there for any appellate court to look at. We're very
09:52:52 14 confident. If you juxtapose us against the kind of
09:52:58 15 cases you're describing, nothing could be further than
09:53:00 16 those kind of cases, where a big trial is forced to try
09:53:04 17 in 90 days; no evidence, no transcripts are turned over
09:53:08 18 by the government. There are all kind of examples.
09:53:11 19 I'm not going to go through that. This man was
09:53:13 20 accommodated time after time after time, sometimes over
09:53:16 21 the government's objection. He also was a tremendous
09:53:19 22 and continues to this day to be a tremendous
09:53:22 23 disciplinary problem inside the facilities that he's
09:53:27 24 been housed in.

09:53:28 25 THE COURT: I wouldn't go there.

09:53:29 1 MR. SOFER: I would request, Your Honor,

09:53:31 2 that the government be able to supplement this record

09:53:33 3 with that disciplinary record of the defendant in jail,

09:53:36 4 at least put it on the record so when an appellate court

09:53:39 5 takes a look at this, they can see that part of the

09:53:41 6 problem here, this whole notion that he's not able to

09:53:43 7 have access to material, not able to interact with his

09:53:46 8 lawyers, not able to get along with some of his lawyers,

09:53:49 9 this is all supported in part by his behavior in jail as

09:53:53 10 well, which, as I say, continues to this day. We

09:53:56 11 believe that it is only appropriate that it be made part

09:53:59 12 of the record. My concern is it's not really made part

09:54:02 13 of the record. When these disputes about the fact that

09:54:06 14 a laptop's been destroyed or the iPod's been tampered

09:54:10 15 with, I know that's come to Your Honor's attention.

09:54:13 16 But there is a litany of assaultive behavior and other

09:54:17 17 kinds of behavior that's taken place in the facilities

09:54:20 18 that this man has been held in which I think only fairly

09:54:23 19 should be before the appellate court trying to examine

09:54:26 20 whether this problem -- which arguably it's the crux of

09:54:30 21 everything, they're saying -- was self-made.

09:54:33 22 THE COURT: I really don't want -- I will

09:54:43 23 grant you leave to submit whatever you want in that

09:54:46 24 regard under seal. And I don't intend to look at it.

09:54:49 25 MR. SOFER: Fair enough.

09:54:51 1 THE COURT: Because as I say, after nine
09:54:54 2 months, I don't see anything. That's a major problem.

09:54:57 3 MR. SOFER: We just want it to be part of
09:54:59 4 the record.

09:55:00 5 THE COURT: That's fine. If they want to
09:55:02 6 open up, peek in it, that's fine. Again, if they think
09:55:06 7 the approach I've taken to that situation is
09:55:10 8 inappropriate, then I think they can also say -- at the
09:55:14 9 very least they can send it back and say, Judge, you
09:55:17 10 should take this into consideration when assessing the
09:55:22 11 sufficiency of the contention that he's been unable to
09:55:29 12 participate in a meaningful way with his attorney at
09:55:32 13 this critical stage of the proceedings, which I believe
09:55:35 14 is the gist of the argument, that it's ultimately a
09:55:39 15 Sixth Amendment argument, inability to work easily and
09:55:44 16 effectively with a client who was, in a sense,
09:55:50 17 sequestered from working with the material and therefore
09:55:52 18 working with counsel.

09:55:56 19 MR. SOFER: Mr. Getz has a few things to
09:55:58 20 say, then I'll sit down.

09:56:01 21 MR. GETZ: In light of the comments you
09:56:04 22 made, I would ask the Court to refer to our brief in
09:56:08 23 response. But there are some matters that because of
09:56:10 24 the government's disadvantage in regards to the
09:56:15 25 communications and the reasons for the various counsel

09:56:19 1 changes, because those, of course, were ex parte, and
09:56:21 2 for necessary reasons and understandable reasons the
09:56:24 3 government's not involved in that, but we can only go by
09:56:27 4 what's on the docket. The docket shows that there was
09:56:32 5 an attorney, Elias Muawad, who was appointed
09:56:36 6 approximately nine months before the trial to represent
09:56:39 7 Mr. Amawi. He stayed on the trial team. He was
09:56:42 8 seated at the table all through the trial. We can only
09:56:45 9 surmise, and I think there's something at one point in
09:56:48 10 one of the pleadings or transcript that indicates that
09:56:53 11 Elias speaks Arabic. And that may have been one of the
09:56:57 12 reasons why he was appointed. Obviously the government
09:56:59 13 doesn't know that. But in looking at the defendant's
09:57:02 14 brief, there's no mention made of his representation.
09:57:04 15 In fact, there's a point at which it specifically says
09:57:07 16 that Mr. Amawi was only represented by four attorneys.
09:57:11 17 We're somewhat confused by that because the docket
09:57:13 18 doesn't seem to reflect that.

09:57:15 19 THE COURT: That's a fair point.

09:57:17 20 MR. GETZ: So we want the record to be clear
09:57:19 21 on that. So if there's any clarification we need, we
09:57:22 22 would like to know what that is.

09:57:24 23 THE COURT: No.

09:57:25 24 MR. GETZ: In regard to comments that were
09:57:27 25 made about what was or wasn't done by attorneys prior to

09:57:30 1 the public defender's office coming back into the case,
09:57:33 2 I would ask the Court to make reference to the
09:57:36 3 transcript of the pretrial conversation or conference
09:57:39 4 that took place on December 17 of 2007 where there was
09:57:45 5 reference made to comments that His Honor apparently
09:57:49 6 made -- again this must have been at a conference at
09:57:51 7 which the government was not present -- as to the
09:57:53 8 enormous amount of work that those attorneys had done on
09:57:56 9 the case and acknowledgment by Mr. Swore that that was
09:57:59 10 his understanding as well.

09:58:00 11 In that conference as well there's a
09:58:03 12 reference to the fact that the defendant, Mr. Amawi, was
09:58:08 13 seeking in December of 2007, he was seeking to have the
09:58:12 14 trial go forward as quickly as possible. And we would
09:58:16 15 like the Court to make note of that.

09:58:18 16 Also during this period of time, and frankly
09:58:22 17 throughout most of the post-indictment period in
09:58:25 18 preparation for trial, this Court clearly made it clear
09:58:28 19 that any motions that were made on behalf of one
09:58:31 20 defendant were considered for all defendants. And
09:58:34 21 that's basically how they were also responded to by the
09:58:37 22 government. So this notion that no substantive motions
09:58:41 23 were made on Mr. Amawi's behalf is really clearly a
09:58:44 24 misrepresentation of what the record really is in this
09:58:48 25 matter.

09:58:48 1 And finally, another point, because of the
09:58:51 2 government's lack of participation, and so we're a
09:58:55 3 little bit at a loss, the docket seems to reflect that
09:58:59 4 when the public defender's office came back in,
09:59:02 5 initially Mr. Terez was appointed, and then he was -- he
09:59:06 6 withdrew about a day later. Now, obviously we don't
09:59:09 7 know the reason for that, but we're again a little
09:59:16 8 concerned about this notion that somehow Mr. Terez's
09:59:22 9 representation in that very critical eight-month period
09:59:25 10 immediately following the indictment when a majority of
09:59:28 11 the discovery was provided, and most of the very
09:59:31 12 preliminary motions were being filed, that --

09:59:35 13 THE COURT: -- should be disregarded?

09:59:38 14 MR. GETZ: Yes.

09:59:40 15 And that he was not available to them to
09:59:41 16 discuss various theories of the case, what kind of
09:59:44 17 decisions had been made by the defense team, and so
09:59:46 18 forth. So we want the Court to consider that as well,
09:59:49 19 particularly in regards to the motion for new trial as
09:59:52 20 it relates to this representation issue and the denial
09:59:56 21 of the continuance. That's all. Thank you.

10:00:03 22 MR. BOSS: Judge, would the Court wish to
10:00:07 23 take a brief -- Mr. Hartman and I will be very brief.

10:00:16 24 THE COURT: Let's take about a 15-minute
10:00:21 25 recess. I may be able to take care of this other stuff

10:00:25 1 during that period.

10:31:17 2 (Recess taken.)

10:31:21 3 THE COURT: Mr. Boss.

10:31:24 4 MR. GETZ: Your Honor, if I may, quickly.

10:31:27 5 Mr. Terez informed me, my reference to his withdrawal

10:31:33 6 that was on the docket, the Court's docket, was

10:31:36 7 apparently a clerical error. Apparently he had not

10:31:39 8 been withdrawn from the case. So to correct the

10:31:44 9 record, I guess I'll inform the Court of that.

10:31:48 10 MR. TEREZ: The first time -- the clerical

10:31:53 11 error occurred when our group got reappointed, Your

10:31:56 12 Honor. For some reason my name was missing. That's

10:31:59 13 all.

10:32:04 14 THE COURT: Mr. Boss.

10:32:06 15 MR. BOSS: Thank you, Judge.

10:32:08 16 THE COURT: Let me also distract you from

10:32:11 17 the argument that you spent time preparing.

10:32:14 18 I really do think that you waived any claim

10:32:17 19 of entrapment. I remember Mr. Hartman quite

10:32:23 20 specifically disclaiming any desire to have an

10:32:26 21 entrapment instruction, so none was given, and I think

10:32:30 22 to argue now that entrapment occurred can't occur. The

10:32:39 23 government says that it hasn't found a case in which

10:32:43 24 this has happened one way or the other. I haven't

10:32:46 25 tried to look. So anyway, that's how I view that.

10:32:53 1 MR. BOSS: Judge, I'll defer to Mr. Hartman
10:32:56 2 on any argument he wants to make since that was a
10:32:59 3 portion of the briefing he has taken care of.

10:33:01 4 THE COURT: I don't think you can revive it,
10:33:03 5 once waived. And that was for the jury to decide. And
10:33:11 6 having prevented them from doing so, I don't think you
10:33:14 7 can go back and have me revisit.

10:33:17 8 Okay. Go ahead.

10:33:19 9 MR. BOSS: Speaking of revisiting, I've had
10:33:22 10 ample opportunity since the trial to reflect back on the
10:33:25 11 trial proceedings from beginning to end. And
10:33:30 12 hindsight's 20/20. Had we known before trial when we
10:33:35 13 were making our motion in limine regarding the video
10:33:38 14 evidence and the transcripts and the names of the
10:33:42 15 terrorists and terrorist organizations, had we known how
10:33:46 16 those were to be employed, we certainly would have
10:33:50 17 argued it differently.

10:33:51 18 THE COURT: I'm sorry?

10:33:53 19 MR. BOSS: Had we known the use that the
10:33:55 20 government was intending to put those pieces of evidence
10:33:59 21 and how they were intending to throw all of Mr. Amawi's
10:34:04 22 videos into a blender of evidence and have that
10:34:09 23 presented uniformly against the defendants in their
10:34:13 24 closing arguments without the focus on Mr. El-Hindi, I
10:34:17 25 can assure you that what I would have done at that time,

10:34:22 1 and what I'm going to direct the Court's attention to
10:34:25 2 now that is different in this motion, is to consider a
10:34:28 3 separate trial for Marwan El-Hindi. This new trial
10:34:32 4 motion, when we look at all of the elements, when we
10:34:36 5 look at the ample evidence that was all against Mr.
10:34:42 6 Amawi of these videos, the very highly prejudicial and
10:34:46 7 inflammatory materials that were translated and read to
10:34:49 8 the jury that were all -- that were all from Mr. Amawi's
10:34:54 9 evidence, had nothing to do with Mr. El-Hindi. Mr.
10:34:59 10 El-Hindi got tarred by the brush that was really Mr.
10:35:02 11 Amawi's evidence.

10:35:03 12 There may arguably be some meat on the
10:35:06 13 government's bones of evidence regarding Mr. Amawi and
10:35:09 14 Mr. Mazloum. There's that gun training, both with Mr.
10:35:14 15 Griffin, and maybe going to Clelands. There's the
10:35:18 16 evidence, to whatever extent you want to look at it,
10:35:21 17 that had to do with the Syrian fellow. There's the
10:35:25 18 Astrolite napkin. None of that, which is the only
10:35:29 19 substantive evidence here about anything being done, had
10:35:33 20 anything whatsoever to do with Marwan El-Hindi. All of
10:35:40 21 these things now in hindsight are so clear. When I
10:35:44 22 think back to the --

10:35:46 23 THE COURT: Basically what you're contending
10:35:51 24 is there's a failure of proof as to agreement because if
10:35:53 25 you've got the conspiratorial agreement, then --

10:35:58 1 MR. BOSS: I'm contending also there's been
10:36:02 2 a miscarriage of justice because when the best juror, a
10:36:06 3 rational juror is subjected to this imagery of
10:36:10 4 beheadings, and the most cursed person since Hitler,
10:36:16 5 this Osama bin Laden and others of his ilk, when they're
10:36:21 6 shown that information, even the most rational juror, I
10:36:24 7 think, becomes tainted.

10:36:27 8 Now, what I'm suggesting to the Court is to
10:36:30 9 do justice here, and that is what we're talking about,
10:36:35 10 whether this conviction should stand, be allowed to
10:36:38 11 stand, whether it's a miscarriage of justice to allow it
10:36:42 12 to do so. I'm suggesting to the Court that not only
10:36:45 13 should Marwan El-Hindi's conviction not stand, but he
10:36:49 14 should get a new trial where this evidence that had
10:36:52 15 nothing to do with him is not permitted to be
10:36:55 16 introduced.

10:36:56 17 Now, Your Honor, we talk about the extensive
10:37:00 18 voir dire of the jury, and there was that. And it was
10:37:03 19 the most, frankly, marvelous voir dire process I've ever
10:37:07 20 participated in. But even with that, we had an
10:37:13 21 experience when this juror number 5 that we all remember
10:37:17 22 that didn't follow the instructions that came in and
10:37:19 23 apparently, to whatever degree, sought to influence the
10:37:22 24 other jurors. What influence that had, we'll never
10:37:26 25 know. But the point is that no voir dire is perfect.

10:37:29 1 THE COURT: I think we do. I found and I'm
10:37:32 2 actually convinced of the accuracy of the finding that
10:37:34 3 it had no impact. Go ahead.

10:37:38 4 MR. BOSS: The point I'm making is he was
10:37:40 5 allowed to slip through the cracks at the beginning.
10:37:43 6 No voir dire is perfect, even though we attempted to.

10:37:46 7 THE COURT: Well, the answer to that is to
10:37:48 8 forego the jury system. We can't do that.

10:37:52 9 MR. BOSS: I'm not suggesting we do.

10:37:54 10 THE COURT: One of the things that candidly
10:37:56 11 aggravates me about the assault in various political
10:38:00 12 quarters on the American jury system is the premise that
10:38:04 13 it's acceptable only if it's perfect. It's a human
10:38:10 14 institution, and like all human institutions, it is
10:38:13 15 fallible. We do the best we can to guard against such
10:38:20 16 fallibility. Who knows what happened with that guy.
10:38:23 17 We were all fortunate that the information came forward.
10:38:29 18 And as I say, I'm convinced that the response that I was
10:38:34 19 able to make after giving ample opportunity to inquire
10:38:39 20 was correct.

10:38:40 21 MR. BOSS: I'm not suggesting it wasn't for
10:38:42 22 a moment. What I'm reflecting on is the -- when I
10:38:45 23 think back to this trial, the imagery that I have that
10:38:48 24 stands out most profoundly for me is the video imagery
10:38:54 25 on the screens of these bombs exploding and the

10:38:59 1 beheadings and that stuff. And when I think about the
10:39:03 2 impact that that had on the jury, and it wasn't related
10:39:09 3 to Mr. El-Hindi, I'm convinced that he didn't get a fair
10:39:12 4 trial. Those videos that were played, by my count 34
10:39:20 5 of them, 29 had absolutely no nexus to Marwan El-Hindi,
10:39:26 6 no evidence he ever saw them, never heard of them, never
10:39:29 7 spoke of them, didn't possess them, nothing. Of the
10:39:32 8 remaining five, two of them he simply spoke of and said
10:39:36 9 he was aware of them. One of them he saw together with
10:39:39 10 Griffin when it was played by Mr. Amawi. And the last
10:39:43 11 one, the martyrdom operation vest video, was a cookie
10:39:49 12 found on Mr. El-Hindi's computer to show it had, at
10:39:54 13 least at one time, transferred over to his computer.
10:39:56 14 That's a heck of a lot different than the imagery that
10:39:59 15 we all remember when we think back to this trial because
10:40:02 16 that imagery is what was on Mr. Amawi's computer and not
10:40:06 17 El-Hindi's. For Mr. El-Hindi, unlike the little bit of
10:40:14 18 meat on the bone perhaps for Amawi and Mazloum, where is
10:40:17 19 the beef? I don't mean to be trite about it.
10:40:21 20 THE COURT: I know.
10:40:23 21 MR. BOSS: But there isn't any. Here is an
10:40:25 22 innocent man convicted because he went to trial in this
10:40:28 23 conspiracy case with his co-defendants and got tarred by
10:40:31 24 the brush of their evidence.
10:40:39 25 Judge, hindsight is 20/20. I'm sorry to go

10:40:42 1 there, but I love our system of justice, and I love
10:40:48 2 everything about it. And it troubles me that a man who
10:40:52 3 has done so little wrong in this case has now been
10:40:56 4 convicted. And to set that straight, the Court should
10:41:02 5 order a new trial.

10:41:13 6 MR. HERDMAN: I'd like to respond.

10:41:15 7 THE COURT: Why don't we hear from Mr.
10:41:21 8 Hartman.

10:41:21 9 MR. HARTMAN: Judge, briefly, I think what
10:41:24 10 we're asking the Court to do is something I think the
10:41:27 11 jury wasn't able to do. I agree that juries can be
10:41:32 12 fallible. I think they got this one wrong as to Marwan
10:41:35 13 El-Hindi.

10:41:35 14 To piggyback on what Chuck was saying,
10:41:42 15 everything El-Hindi did, I believe, fit squarely within
10:41:49 16 the ambit of jury instruction 19, which is proof that a
10:41:54 17 defendant knew about a conspiracy or was present at
10:41:56 18 times or associated with members of the group is not
10:41:59 19 enough, even if he approved of what was happening or did
10:42:03 20 not object to it. In other words, if he didn't run
10:42:07 21 away. Similarly, because the defendant may have done
10:42:10 22 something that happened to help a conspiracy does not
10:42:12 23 necessarily make him a conspirator. These are things
10:42:16 24 that can be considered in deciding whether the
10:42:18 25 government has proved the defendant joined the

10:42:22 1 conspiracy. Without more, they are not enough. And I
10:42:25 2 think that's what we have with El-Hindi because the case
10:42:28 3 against him is remarkably different than the case
10:42:31 4 against Amawi or Mazloum. The case against El-Hindi
10:42:35 5 started back in 2002. And we're asking the Court to
10:42:40 6 acknowledge that the cases are different. And because
10:42:45 7 of conspiracy law -- I mean, they call it the
10:42:49 8 prosecutor's darling for a reason; they can bring them
10:42:52 9 all in the room together. The government put it
10:42:56 10 together effectively, an incredible presentation,
10:42:59 11 particularly in their closing and rebuttal closing, that
10:43:04 12 mixed this evidence up so much that it was hard to tell
10:43:07 13 what came from where and who was present when which
10:43:10 14 conversations were had. And I don't think that it's
10:43:13 15 fair to allow that to stand when you evaluate what
10:43:17 16 El-Hindi did.

10:43:19 17 Now, my evaluation of the evidence in the
10:43:22 18 briefs, which will stand on its own, is that there was
10:43:26 19 nothing there that he did, whether it be the Ahmed
10:43:30 20 cousins or anything else. The reason that we ask the
10:43:37 21 Court to find entrapment as a matter of law -- and I
10:43:39 22 respectfully disagree that the Court can't find it
10:43:44 23 because we didn't put on a defense. The fact that we
10:43:46 24 didn't ask for an entrapment instruction I don't believe
10:43:50 25 means that we didn't argue the fact. And I believe the

10:43:53 1 Court can look at the evidence in total and say, you
10:43:57 2 know what, as matter of law, based on what did come in,
10:44:01 3 this is entrapment. And that's what Rule 29 is for, I
10:44:06 4 believe. And I believe this case defines entrapment
10:44:13 5 based on the evidence that came in at trial. And I
10:44:16 6 won't comment on what the evidence was because we all
10:44:18 7 sat through it. But suffice it to say that I think
10:44:25 8 that's why we have Rule 29. And I think the fact that
10:44:28 9 the Court recognized that the jury system can be
10:44:31 10 fallible is exactly why these motions are appropriate
10:44:34 11 for El-Hindi because it's so much different for him, the
10:44:40 12 case is so much different.

10:44:41 13 The contact period, the timeframe of
10:44:44 14 contacts, the quality, if you will, of the evidence, the
10:44:52 15 government had to go to things against Mr. El-Hindi that
10:44:59 16 weren't there against the two co-defendants because of
10:45:01 17 what wasn't there against him because he didn't make
10:45:04 18 those comments about killing Americans, the direct
10:45:09 19 comments that I think the other co-defendants made.
10:45:12 20 The government had to bring the Ahmeds into this case.
10:45:15 21 And when the Court evaluates the evidence, what really
10:45:18 22 happened with the Ahmeds, here are two kids on their way
10:45:21 23 to go commit an act of terrorism, admittedly on their
10:45:24 24 way to go commit an act of terrorism, and he stopped
10:45:28 25 them. And whatever he might have said after they came

10:45:30 1 back, they didn't ever do anything because of him,
10:45:34 2 whatever he might said. Was he a talker? Whatever was
10:45:44 3 talked about, what happened, and then after February 16,
10:45:50 4 this conversation that he wasn't an active participant
10:45:55 5 in, but admittedly, as the government points out, never
10:45:58 6 changed the subject, and he didn't run away. And if
10:46:01 7 that's what it takes to convict somebody, fine, then
10:46:04 8 this conviction should stand. But if not, then the
10:46:07 9 Court should evaluate the year after that. What did
10:46:12 10 El-Hindi do in the year after February 16 that had
10:46:15 11 anything to do with terrorism? Nothing.

10:46:20 12 I think it's appropriate for the Court to
10:46:23 13 look at the big picture, as you said, to step back under
10:46:27 14 the ambit of Rule 29, and to evaluate this and say, as a
10:46:32 15 matter of law the government proved a conspiracy. We're
10:46:38 16 not contending they didn't, but they didn't prove that
10:46:41 17 El-Hindi joined it. Everything he did was either
10:46:44 18 protected by the First Amendment, by freedom from
10:46:47 19 association, or it fits squarely within the ambit of
10:46:51 20 jury instruction 19. And I think the Court should
10:46:57 21 recognize that and enter a motion for acquittal, and I
10:46:59 22 think the Court can do so on sufficiency of the evidence
10:47:02 23 as to that element of agreement to join the conspiracy,
10:47:08 24 and I think it can do so on entrapment as matter of law.
10:47:18 25 It's our position that it should.

10:47:26 1 MR. HERDMAN: First of all, the question
10:47:28 2 raised at the outset of entrapment as matter of law.
10:47:32 3 The government has not been able to find a case where
10:47:34 4 the Court has granted a motion for entrapment as a
10:47:37 5 matter of law or made a finding of entrapment as a
10:47:40 6 matter of law where the defendant did not make a jury
10:47:42 7 instruction prior to the jury rendering a verdict. So
10:47:46 8 I just wanted to make that clear. There was some
10:47:50 9 question raised in counsel's reply as to what the
10:47:53 10 authority was for it, but nowhere have I been able to
10:47:56 11 find a case where the defense did not make a request for
10:48:00 12 an instruction and then raise it.

10:48:02 13 THE COURT: Candidly, it makes no sense to
10:48:04 14 me that they should be able to do that. It seems to me
10:48:08 15 an issue for the jury, just the government being able to
10:48:11 16 offer predisposition evidence.

10:48:13 17 MR. HERDMAN: There is the possibility we
10:48:14 18 could have offered additional evidence for this defense
10:48:20 19 raised --

10:48:22 20 THE COURT: Candidly -- that is correct,
10:48:24 21 that not presented the opportunity when it should have
10:48:29 22 been presented to you because an instruction was
10:48:32 23 requested, who knows.

10:48:40 24 MR. HERDMAN: There is a case I cited to;
10:48:42 25 it's a little convoluted, but a similar intent was made,

10:48:47 1 and the Sixth Circuit found that was an inappropriate
10:48:50 2 argument to be making.

10:48:51 3 THE COURT: My point is it simply subverts
10:48:55 4 the jury system. It's up to the jurors to make that
10:48:57 5 decision, not up to me. And again, I want to make that
10:49:01 6 very clear. And sitting up here and thinking, well,
10:49:05 7 maybe I should accept the invitation being presented to
10:49:10 8 me by Mr. Hartman to go ahead and to sua sponte comb the
10:49:17 9 record and determine whether or not he was entrapped,
10:49:23 10 but as I sit here, I'm strongly inclined not to do that
10:49:26 11 and to put it squarely in the lap of the Sixth Circuit.
10:49:30 12 Say, look, you tell me if that's what I should do, I and
10:49:34 13 every other district Judge in the country should be
10:49:38 14 doing where a defendant deliberately with thoroughly
10:49:42 15 competent, capable counsel makes a deliberate decision
10:49:46 16 not to request an instruction, and then comes back and
10:49:54 17 tries to play the game over, having that opportunity
10:50:02 18 when I think it was appropriate.

10:50:06 19 MR. HERDMAN: Your Honor, that same standard
10:50:08 20 applies to this insufficiency of the evidence argument
10:50:11 21 that Mr. Hartman made, which is that these arguments
10:50:13 22 that were made to the jury, these are the same arguments
10:50:16 23 he made in his closing argument. He's now asking this
10:50:19 24 Court to apply a standard different than that required
10:50:21 25 under Rule 29 in reviewing the evidence. And in the

10:50:25 1 government's response to the Rule 29 motion for
10:50:29 2 acquittal, there are laid out specific instances -- it's
10:50:33 3 not exclusive, but there are specific instances that are
10:50:36 4 laid out, factually derived from the evidence in this
10:50:38 5 case, that establish that Mr. El-Hindi did, in fact,
10:50:41 6 join this conspiracy.

10:50:42 7 And just one example of that, again, Mr.
10:50:46 8 Hartman said that the government brought the Ahmeds into
10:50:48 9 this case. Mr. El-Hindi brought the Ahmeds into this
10:50:50 10 case. Mr. El-Hindi is the one that brought the Ahmeds
10:50:54 11 to the attention of Darren Griffin. Darren Griffin had
10:50:55 12 no idea who the Ahmeds were before Mr. El-Hindi
10:50:58 13 introduced them as brothers who were willing to train.
10:51:00 14 That's just one small example, but it is at the outset
10:51:03 15 of the charged conspiracy in this case. And I just
10:51:06 16 raise it for the Court now because it's important to
10:51:08 17 what happened at trial; it's important to the evidence
10:51:11 18 that went in at trial; it's important to the arguments
10:51:14 19 that were made to the jury, and it runs through what the
10:51:17 20 government has presented in our response in terms of the
10:51:19 21 evidence. And I won't go through it all. But it's
10:51:22 22 there. It takes up about five, six pages of our
10:51:25 23 response, specific dates, instances.

10:51:27 24 And I would also point out instances and
10:51:29 25 dates after February 16, 2005 where Mr. El-Hindi,

10:51:34 1 there's evidence that he participated in this conspiracy
10:51:36 2 willingly, voluntarily, and intentionally, that he knew
10:51:39 3 what the objectives were, and that he joined this
10:51:42 4 conspiracy with his coconspirator. All that is laid
10:51:45 5 out in the government's response. I don't think I need
10:51:47 6 to belabor it any more than I have.

10:51:50 7 Now, with respect to Mr. Boss, there was
10:51:59 8 some allusion made that the defense was not aware of the
10:52:07 9 videos the government was going to play for the jury.
10:52:09 10 Nothing could be farther from the truth. Well in
10:52:12 11 advance of trial, I looked back over the docket, I know
10:52:14 12 there's a specific date that's indicated on there, March
10:52:17 13 21, 2008, I brought to the Court a disk containing not
10:52:23 14 only videos that were going to be played, but the number
10:52:25 15 of consensual recording to which those videos related,
10:52:29 16 as Your Honor had requested.

10:52:31 17 THE COURT: Not requested, instructed.

10:52:34 18 MR. HERDMAN: Instructed, yes. And that
10:52:36 19 was in light -- that was provided to defense counsel as
10:52:40 20 well, but it was also provided in the context of a
10:52:43 21 pending motion in limine that had been filed by Mr.
10:52:45 22 El-Hindi. And that disk contained every video that was
10:52:50 23 ultimately played for the jury. It also contained
10:52:54 24 videos that the government elected not to play for the
10:52:56 25 jury. But it essentially pinpointed where in the

10:53:00 1 government's evidence those videos were found.

10:53:02 2 Now, keep in mind that the defense had

10:53:05 3 already been provided with revised transcripts by the

10:53:08 4 government, that we had indicated the actual portions of

10:53:12 5 the consensual recordings we were going to play. It's

10:53:15 6 very clear from those consensual recordings where a

10:53:19 7 video is playing. Keep in mind an exhibit list had

10:53:23 8 already been provided to defense that delineated these

10:53:26 9 videos. So the notion that Mr. Boss had no idea what

10:53:30 10 videos were going to be played is simply not the case.

10:53:32 11 Moreover with respect to the notion that

10:53:34 12 there were terrorists' names, organizations, terrorists'

10:53:37 13 names that were presented to the jury that were so

10:53:40 14 offensive that Mr. El-Hindi could not have received a

10:53:42 15 fair trial, many of those names and organizations came

10:53:46 16 off of a list of them that were stipulated to by defense

10:53:49 17 counsel. And those were agreed to. So for them to

10:53:52 18 object to that now is -- I find perplexing, but

10:53:56 19 nonetheless, it's in their motion.

10:53:59 20 One thing that Mr. Boss didn't say, which I

10:54:01 21 find interesting, is that those conversations where Mr.

10:54:06 22 Amawi's speaking to Mr. Griffin and in which a video is

10:54:10 23 played, it's very clear Mr. El-Hindi wasn't present. In

10:54:16 24 fact, Mr. Boss didn't object to consensual recordings

10:54:20 25 between Mr. Griffin and Mr. Amawi. And some of the

10:54:24 1 things Mr. Amawi says in those consensual recordings
10:54:26 2 could be perceived as far more prejudicial than the
10:54:29 3 actual videos. It was very clear, this point was made
10:54:32 4 by the Court repeatedly, that the videos that were
10:54:35 5 played pursuant to consensual recordings made by Mr.
10:54:40 6 Griffin of Mr. Amawi were to be considered with respect
10:54:43 7 to Mr. Amawi's intent only. And that instruction was
10:54:47 8 given to this jury. I pointed that out in our
10:54:50 9 response. It's very clear that the jury was instructed
10:54:52 10 with respect to those videos. So there can't really be
10:54:58 11 a question that Mr. El-Hindi was somehow tarred by this
10:55:00 12 brush of Mr. Amawi's videos. It was delineated both in
10:55:03 13 the evidence and in the instructions what the jury was
10:55:06 14 to consider with respect to those videos.

10:55:10 15 As to videos that Mr. El-Hindi did have
10:55:14 16 access to, those videos are very important. There are
10:55:17 17 only five of them that were in the government's evidence
10:55:19 18 that touched upon Mr. El-Hindi. But in some ways those
10:55:21 19 five are perhaps the most critical videos that were
10:55:24 20 played for the jury, and, in fact, one of them, which
10:55:27 21 was the only beheading video that was played for the
10:55:33 22 jury, each defendant displayed an independent knowledge
10:55:36 23 of this video, of the purpose of the video, the fact
10:55:38 24 that this Egyptian trader had been working for the U.S.
10:55:42 25 military, had been planting sensors in locations, and

10:55:47 1 had contributed to the deaths of Muslims as well as
10:55:51 2 women, I believe, was also referred to, and he did it
10:55:54 3 for money. This is something that defendants all
10:55:56 4 discussed on February 16. And importantly, they
10:55:59 5 discussed it in Arabic. It was a conversation Mr.
10:56:03 6 Griffin really had nothing to do with. He was present,
10:56:06 7 but it was in a language he really didn't understand.
10:56:08 8 It was a conversation all three of these defendants had
10:56:11 9 with respect to that one beheading video. So that
10:56:14 10 video is important from the government's perspective.
10:56:16 11 It's important in proving our conspiracy. And again,
10:56:18 12 I'm not going to go through all the reasons why these
10:56:21 13 videos were relevant and material, why they were
10:56:23 14 properly admitted. That's in our motion. There's, I
10:56:26 15 think, nine theories under which they were admitted,
10:56:29 16 nine theories to which the defense objected and did
10:56:33 17 object and theories that the Court took into
10:56:36 18 consideration when this evidence was properly admitted
10:56:38 19 at trial.

10:56:40 20 And that's essentially all I have. Mr. Boss
10:56:43 21 didn't address all the issues that were raised in his
10:56:46 22 Rule 33 motion, but again, we responded to those on
10:56:52 23 paper as well.

10:56:54 24 MR. HARTMAN: I'm going to reply very, very
10:56:56 25 briefly before Chuck has a chance to do so.

10:56:57 1 I think the question for the Court is would
10:57:00 2 the Court have had the authority to grant a judgment of
10:57:06 3 acquittal based on entrapment as a matter of law at the
10:57:10 4 close of the government's case. And I think if the
10:57:12 5 answer to that question is yes, then the Court can still
10:57:16 6 do so now. We didn't put on a defense. It wasn't
10:57:21 7 sandbagging. The fact that we didn't actually ask for
10:57:24 8 the instruction wouldn't have foreclosed the Court from
10:57:26 9 deciding as a matter of law all the evidence the
10:57:30 10 government put in is entrapment at the close of their
10:57:33 11 case. The Court could have done it then. And, in
10:57:37 12 fact, I believe when we made our motion for judgment of
10:57:39 13 acquittal at the close of the government's case, the
10:57:42 14 Court said it's not going to grant anything now; we can
10:57:45 15 brief those when the trial's over. I believe --

10:57:48 16 THE COURT: Mr. Herdman, what do you think?
10:57:52 17 That kind of makes sense to me. Couldn't I have taken
10:57:55 18 the government's -- and I can't recall whether I was
10:57:58 19 asked to do so. If I wasn't then, again, I think you
10:58:02 20 have the same problem. But if I was asked to do so --
10:58:06 21 I mean, it's still a waiver issue, isn't it,
10:58:08 22 Mr. Hartman?

10:58:11 23 MR. HARTMAN: I don't remember if I
10:58:13 24 specifically asked the Court to do that.

10:58:14 25 THE COURT: I don't think you did. I'm

10:58:16 1 quite certain you didn't. And that certainty is
10:58:23 2 reinforced by the fact that you have waived any request
10:58:29 3 for the instruction.

10:58:30 4 You raise a very interesting point, and you
10:58:37 5 may and probably -- may be correct that where I am asked
10:58:45 6 to exercise authority at the completion of the
10:58:50 7 government's case, you can renew that request in a Rule
10:58:55 8 29 motion. But I don't -- not having been called upon
10:59:01 9 then to exercise it, I don't think that I can de novo
10:59:15 10 exercise that authority at this stage.

10:59:20 11 MR. HARTMAN: And I think what Rule 29 says,
10:59:23 12 at least since it was amended in 2005, I don't recall
10:59:26 13 about beforehand, but at least since 2005 it says the
10:59:30 14 motion need not be made before in order to be made after
10:59:34 15 the jury's verdict. So you put those two things
10:59:37 16 together, I don't think you have a waiver issue. I
10:59:39 17 think we can ask the Court to look at it in exactly the
10:59:42 18 same light that it would have looked at it in -- at the
10:59:46 19 close of the government's case. In particular in this
10:59:48 20 case because we didn't put on a defense.

10:59:54 21 MR. HERDMAN: There's the two issues in play
10:59:56 22 here. The first is that the original Rule 29 motion
10:59:59 23 that was made by Mr. El-Hindi, my memory is somewhat
11:00:02 24 faulty on this, but I have reviewed it recently; there
11:00:04 25 was no mention made of an entrapment defense at this

11:00:07 1 point in time.

11:00:08 2 THE COURT: I'm sure that that's correct.

11:00:11 3 MR. HERDMAN: So putting aside that issue,
11:00:13 4 Your Honor, the fact that a motion is able to be made,
11:00:16 5 or that motion not -- not having been able to be made
11:00:21 6 prior to the verdict being rendered, it doesn't get
11:00:24 7 around the notion that I raised in the motion, which is
11:00:27 8 that this is a rebuttable defense. The government is
11:00:30 9 entitled to present evidence of predisposition if that
11:00:36 10 is a necessary element here. And it is. This is a
11:00:39 11 two-element defense. If we even concede inducement,
11:00:43 12 which I don't do so, but --

11:00:46 13 THE COURT: If you concede?

11:00:48 14 MR. HERDMAN: -- inducement, Your Honor.

11:00:54 15 For the defense to effectively foreclose any
11:00:57 16 presentation of evidence on a fairly critical issue,
11:01:00 17 then to submit it to the jury, then after we have no
11:01:03 18 chance to present additional evidence to come back to
11:01:06 19 this Court and ask for a finding like that when they
11:01:09 20 didn't ask for the instruction is -- it's just
11:01:11 21 fundamentally unfair to the government in terms of the
11:01:14 22 presentation of evidence that we would have been allowed
11:01:16 23 to proceed with were this raised properly at trial.

11:01:21 24 MR. HARTMAN: Again, I could point to the
11:01:23 25 fact it can be done at the close of the government's

11:01:25 1 case. I'll let Chuck --

11:01:27 2 MR. BOSS: I have nothing further.

11:01:33 3 MR. BRYAN: If I may, briefly.

11:01:36 4 MR. HARTMAN: Unless the Court has questions

11:01:38 5 for us.

11:01:38 6 THE COURT: That's okay.

11:01:39 7 MR. BRYAN: My comments were triggered

11:01:44 8 listening to Mr. Boss, Mr. Boss' argument. There is

11:01:47 9 something I neglected to mention during my allotted

11:01:50 10 time. Mr. Boss triggered my memory of this in the

11:01:54 11 sense he was talking about the fact that the vast

11:01:56 12 majority of materials involved in this case, especially

11:01:59 13 as it related to Jihadist videos and things of that

11:02:10 14 nature, were possessed and found within the possession

11:02:14 15 of Mr. Amawi. Obviously we heard it during the

11:02:18 16 consensually monitored tapes, Mr. Amawi and Mr. Griffin

11:02:23 17 viewing these materials together; not only that, but all

11:02:26 18 the materials that were found on Mr. Amawi's computer.

11:02:29 19 And again, Mr. Sofer argued in closing

11:02:32 20 argument they were not unlawful to possess. There was

11:02:36 21 maybe an instruction. These matters were not unlawful

11:02:40 22 to possess. But the jury could consider it as it

11:02:44 23 related to the defendants' intent, not whether he

11:02:47 24 sympathized with the Jihadist movement, but had the

11:02:50 25 intent to join the Jihadist movement by violating the

11:02:54 1 law in this case.

11:02:55 2 What memory that triggered in me is also we
11:02:58 3 raised in our motion for a new trial was the denial of a
11:03:02 4 defense that we present expert witnesses.

11:03:04 5 THE COURT: Actually, I was going to mention
11:03:06 6 that. Let me simply say I -- in light of your argument
11:03:10 7 I've revisited in my mind's eye those rulings. And I
11:03:18 8 once again find no problem with them. Again, I do
11:03:21 9 think, though, that's something properly to urge upon
11:03:26 10 the Court of Appeals. And it may be something that
11:03:34 11 reasonable people can disagree on. But I made the
11:03:36 12 decisions for the reasons I did, both with regard to the
11:03:41 13 three defense witnesses and to allowing Mr. Kohlmann to
11:03:49 14 come in and testify when I did and as he did. So I
11:03:53 15 have considered that on the papers. It's good that you
11:04:01 16 remind me or at least you be satisfied that I have
11:04:05 17 thought of that.

11:04:06 18 MR. BRYAN: Just sort of to supplement the
11:04:09 19 record with my argument that the jury in this case was
11:04:12 20 able to view the evidence through the prism of their
11:04:16 21 experience being United States citizens after 9/11.
11:04:20 22 But what denied us the opportunity to present our expert
11:04:23 23 witnesses then was to not allow the jury to view the
11:04:28 24 evidence through the prism of our clients as Middle
11:04:33 25 Eastern Muslims, especially as it related to our

11:04:36 1 client's views of the Iraqi war. Both altered --

11:04:42 2 THE COURT: I'll simply say again, if I

11:04:44 3 recall that evidence was presented, and I believe I

11:04:50 4 responded to it. And certainly hearing it again today,

11:04:58 5 I simply don't think that that testimony has a

11:05:03 6 sufficient nexus to these individuals to have been

11:05:07 7 admissible. I mean, I believe that was the position I

11:05:10 8 took before. I'm looking --

11:05:14 9 MR. SOFER: Yes, Your Honor. Slightly more

11:05:18 10 verbiage, but that was basically it.

11:05:22 11 THE COURT: Again, I don't think that the

11:05:28 12 record and the proposed testimony had a connection to

11:05:43 13 these individuals. Any that's what I ruled and why I

11:05:50 14 did, as I recall.

11:05:57 15 I'll give you until Friday to supplement the

11:06:00 16 record, the Government until the following Friday. The

11:06:05 17 matter is under advisement. I will try to get a

11:06:09 18 decision out very promptly.

11:06:12 19 MR. BRYAN: Mr. Terez advises me that Friday

11:06:15 20 will be Good Friday.

11:06:17 21 THE COURT: Let's do it Friday. If the

11:06:19 22 record is as you suggest, it should take a couple hours

11:06:23 23 to sort it out.

11:06:24 24 MR. SOFER: Actually, there should be

11:06:26 25 nothing if what counsel is saying is true.

11:06:31 1 THE COURT: That will conclude these
11:06:32 2 proceedings.

3 (Concluded at 11:06 a.m.)

4 - - -

5
6 C E R T I F I C A T E

7
8 I certify that the foregoing is a correct transcript
9 from the record of proceedings in the above-entitled
10 matter.

11

12 /s Tracy L. Spore _____

13 Tracy L. Spore, RMR, CRR

14 Date

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